UBMITTED, 23d Rule

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 344

T. H. DEAL AND UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 17, 1926

CERTIORARI GRANTED MAY 24, 1926

(31,861)

(31,861)

SUPREME COURT OF THE UNITED STATES

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In the District Court for the Territory of Alaska,
Fourth Judicial Division.

United States of America,
Territory of Alaska,
Fourth Judicial Division,—ss.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Rob't W. Taylor, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, hereby certify that the foregoing and hereto attached 464 pages of typewritten matter, numbered from 1 to 464, both inclusive, constitute a full, true and complete copy, and the whole thereof, of transcript of record as requested in praecipe for transcript hereto attached and original writ of error, citation on writ or error, order extending time within which to file and docket cause on writ of error, stipulation relative to printing of record, and order modifying order for forwarding exhibits in cause No. 2647, entitled The United States of America, plaintiff, vs. T. H. Deal and the United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, as the same appears or copies of the same appear on file and of record in this office.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 25th day of June, 1925.

[Seal] ROB'T W. TAYLOR,
Clerk.

By _____,
Deputy.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Attorney for the United States of America:
JULIEN A. HURLEY, U. S. District Attorney, Fairbanks, Alaska.

Attorney for T. H. Deal:
R. F. ROTH, Attorney at Law, Fairbanks, Alaska.

Attorney for the United States Fidelity and Guaranty Co. of Baltimore, Maryland, a Corporation:
JOHN A. CLARK, Attorney at Law, Fairbanks, Alaska.

Filed in the District Court, Territory of Alaska, 4th Div. Nov. 18, 1924. Rob't W. Taylor, Clerk. By E. A. Tonseth, Deputy.

In the District Court of the Territory of Alaska, Fourth Division.

No. 2647.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

T. H. DEAL and THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, a Corporation,
Defendant.

SECOND AMENDED COMPLAINT.

Comes now the United States of America, plaintiff above named, by Julien A. Hurley, United States Attorney for the Fourth Division of Alaska, and Fred D. Crane, Assistant United States Attorney, as aforesaid, acting by authority of and for and on behalf of the United States of America, and complains of the said T. H. Deal and the United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, for cause of action files this its second amended complaint, permission of the Court having been first had and obtained, alleges:

I.

That this action is prosecuted at the request of the Treasury Department of the United States, and under authority of the Attorney General of the United States.

II.

That the defendant, T. H. Deal, is a citizen of the United States and a resident of the Fourth Division, Territory of Alaska, and that the defendant United States Fidelity and Guaranty Company of Baltimore, Maryland, is a corporation organized under the laws of the State of Maryland, and is authorized to do a general surety business within the Territory of Alaska. [1*]

III.

That heretofore, to wit, on or about the 5th day of September, 1918, the said T. H. Deal was ap-

*Page-number appearing at foot of page of original certified Transcript of Record.

pointed and commissioned to be postmaster at Fairbanks, Territory of Alaska, and on the 19th day of November, 1918, having duly qualified, entered upon his duties as such postmaster.

IV.

That about the time of the appointment of said T. H. Deal as such postmaster, and to procure the issuance of a commission to him as such, on or about the 19th day of November, 1918, the said T. H. Deal as principal, and the said United States Fidelity and Guaranty Company as surety, made, executed and delivered to the United States of America, their joint and several obligations in writing, whereby they bound themselves, their heirs, executors, administrators, successors and assigns to pay the United States of America the sum of $26,000.00.

V.

That the condition of said obligation is that the said T. H. Deal, after he had entered upon said office as postmaster at Fairbanks, Territory of Alaska, should faithfully discharge all the faiths and trusts imposed on him as such postmaster either by laws or the regulations of the Postoffice Department of the United States, and should faithfully act as deliverer and pay to the proper officials or persons all moneys, money matter and other property of any kind that should come into his hands as such postmaster, and which should come into his hands by virtue of his occupancy of such position as postmaster to which he should be appointed and for which he should qualify, and said bond was duly accepted by said plaintiff.

VI.

That at the time of executing the obligation hereinbefore [2] mentioned the said T. H. Deal as postmaster, subscribed to the usual oath of office as provided for for postmasters, a copy of said oath of office, together with the obligation referred to in Paragraph VI, is attached hereto marked Exhibit "A" and made a part hereof.

VII.

That the said T. H. Deal was the duly appointed, qualified and acting postmaster at Fairbanks, Territory of Alaska, from the 5th day of September, 1918, to and including the 16th day of November, 1922.

VIII.

That on the 15th day of September, 1921, the First National Bank, a banking corporation of Fairbanks, Territory of Alaska, through its proper officers or employees, deposited in the United States Postoffice at Fairbanks, Alaska, a parcel containing $9,937.65, in lawful money of the United States and property of the United States, for transmission through the mails to the Special Disbursing Officer of the Alaska Engineering Commission at Healy, Alaska, by way of Nenana, Alaska, and that said package or parcel of money was properly marked, postage prepaid and registered by the said bank, its officers or employees.

IX.

That while in the custody and under the care of the above-named defendant, T. H. Deal, who was at that time postmaster, the registered parcel or

package aforesaid, due to the negligence of said T. H. Deal, and due to the disregard of the postal laws and regulations by said T. H. Deal, was opened and rifled and the sum of $9,900.00 in currency of the United States was taken therefrom and the said currency taken therefrom was the property of the United States of America. [3]

X.

That prior to and at the time of the depredation upon and loss from the registered package aforesaid the said defendant, as postmaster, failed, refused and neglected to perform his duty as such with reference to said registered package of mail matter in the manner required by law, and violated the obligations of said bond and writing obligatory referred to in paragraphs IV, V, and VI of the complaint herein; and said defendant, as said postmaster, failed to observe, perform and discharge the duties and trusts imposed upon him by law and the regulations of the Postoffice Department with reference to said registered package aforesaid, and failed and neglected to use ordinary care in handling the said registered package, and failed and neglected to properly protect and safeguard the said registered package as registered mail matter, and failed and neglected to handle said registered package as such in the manner prescribed by law and the regulations of the Postoffice Department, and handled the same in a careless and negligent manner, and in utter disregard of the law and the said regulations aforesaid, particularly of sections 361, 524, 940 and 1015 of the

regulations of said Postoffice Department promulgated in 1913.

XI.

By reason of the premises plaintiff herein sustained a loss of $9,900.00. That the plaintiff has made demand upon the defendants for the sum of $9,900.00, and they refuse to pay the same and still refuse to pay, and that there is now due and owing from said defendants to the plaintiff herein the sum of $9,900.00, together with interest thereon.

WHEREFORE plaintiff prays judgment against the said defendants, T. H. Deal, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, and each of them, in the sum of $9,900.00, together with [4] interest thereon and for its costs and disbursements herein incurred.

JULIEN A. HURLEY,
United States Attorney.
FRED D. CRANE,
Assistant United States Attorney. [5]

United States of America,
Territory of Alaska,—ss.

I, Julien A. Hurley, being first duly sworn, upon oath depose and say, that I am United States Attorney for the Fourth Division, for the Territory of Alaska; that I appear for and represent the United States of America, the above-named plaintiff; that I have read the foregoing complaint, know the contents thereof and have signed the

same in my own proper handwriting; that said complaint is true as I verily believe.

JULIEN A. HURLEY.

Subscribed and sworn to before me this 18th day of November, 1924.

[Seal] E. B. COLLINS,
Notary Public for Alaska.

My Commission expires November 18, 1927. [6]

EXHIBIT "A."

Central Accounting Office.

Jan. 25, 1919.

(Name of surety company.)	(Date of commission.) Jan. 29, 1919.
(Change of name.)	(Date commission mailed.) Same Postmaster.
(M. O. or Not M. O.)	(Same P. M., Acting P. M. Change name by marriage.)

POSTOFFICE DEPARTMENT.

BOND OF POSTMASTER.

KNOW ALL MEN BY THESE PRESENTS, That we, Thomas H. Deal, of Fairbanks, in the county of ———, State of Alaska, as principal, and U. S. Fidelity & Guaranty Co., Washington, D. C.,

(Name and home address of surety company or names in full and postoffice addresses of individual sureties.)

(Name and home address of surety company or names in full and postoffice addresses of individual sureties.)

(Name and home address of surety company or names in full and postoffice addresses of individual sureties.)

(Name and home address of surety company or names in full and postoffice addresses of individual sureties.)

as surety, do hereby bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, to pay to the United States of America the sum of twenty-six thousand dollars ($26,000.00).

IN WITNESS WHEREOF we have hereunto subscribed our names and affixed our seals this 19th day of November, in the year one thousand nine hundred and eighteen.

WHEREAS the above-bound Thomas H. Deal was on Sep. 5, 1918, appointed postmaster at Fairbanks aforesaid, and has duly executed the prescribed oath of office.

NOW THE CONDITION OF THIS OBLIGATION IS, That if the said Thomas H. Deal

(In above space print name with typewriter or pen.)

shall faithfully discharge all duties and trusts imposed [7] on him as postmaster either by law or by the regulations of the Postoffice Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to law, in connection with the Postal Savings System, then this obligation shall be void; otherwise, of force.

(Signature of postmaster below in full.)

T. H. DEAL. (Seal)

UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Name of surety company.)

By WM. H. WORMSTEDT.

(Signature of executing officer.)

Attorney-in-fact.

[Seal of Surety Company]

Attest: ————————,

(Signature of attesting officer.)

Agency at ————————,

(Postoffice and state.)

Signed and sealed in the presence of:

(Witnesses as to signature of postmaster.)

WHITNEY W. CLARK.

GRACE M. ROLSTON.

(Witnesses as to signature of officers or agents of surety company.)

K. WATERS.

C. JACKSON.

(The spaces below are to be used if individual sureties are furnished.)

(Witnesses as to signature of individual sureties.)	(Signature of individual sureties below.	
————————	————————	Seal.
————————	————————	Seal.
————————	————————	Seal.
————————	————————	Seal.
————————	————————	Seal.

Bond accepted Dec. 20, 1918.

For the Postmaster General.

By J. C. KOONS,

First Assistant Postmaster General.

CWL C. R. H. [8]

CERTIFICATE AS TO PREMIUM CHARGED BY SURETY COMPANY.

The premium on the bond is $2.00 per $1,000. The rate of premium charged for a like bond during the calendar year 1908 was $2.00 per $1,000.

(Signature of officer or agent.)

WM. H. WORMSTEDT,

Attorney-in-Fact.

(Title.)

TO BE EXECUTED ONLY WHEN INDIVIDUAL SURETIES ARE FURNISHED.

State of ———,

County of ———, ss.

The undersigned being duly sworn, each deposes and says that he has signed the foregoing bond as surety; that he is a resident of the same United States judicial district as the principal therein, and that he is worth the sum here written opposite his signature, over and above all debts and liabilities, in unincumbered real estate situated in the said United States judicial district and not by law exempt from levy and sale on execution.

(The sums written below must equal in the aggregate double the penalty of the bond.)

(Each surety must sign his name here.)	(Sum in words.)	(Sum in figures.)
_____	_____ dollars	$_____
_____	_____ dollars	$_____
_____	_____ dollars	$_____
_____	_____ dollars	$_____

Subscribed and sworn to before me this ——— day of ———, 191——.

[Official Seal] _____,
(Signature of Certifying Officer.)
(Title.)

INSTRUCTIONS.

1. The oath of office must be taken on the form printed on the following page before the bond is executed.

2. It is not required that both corporate and individual surety be furnished, and either kind will be accepted.

3. The bond must be executed by the postmaster and by at least two individual sureties or the officers or agents of the surety company authorized to execute bonds in its behalf. The seal of the surety company must be affixed. If a corporate bond is used, the Department has no preference among the

acceptable bonding companies named in the Postal Guide.

4. The postmaster and each individual surety must write one of his given names in full and each name must be written in the same form every time it appears in the bond. [9]

5. There must be witnesses to the signatures of the principal and the officers or agents of the surety company or the individual sureties.

6. An individual surety will not be accepted as a witness.

7. The individual sureties must all reside within the same United States judicial district as the principal.

8. A married woman will not be accepted as a surety. An unmarried woman will be accepted if she submits a certificate that she is not married, signed by one of the officers named in paragraph 9.

9. The individual sureties must justify, in sums, in unincumbered real estate, equal in the aggregate to double the penalty of the bond, before a notary public, justice of the peace, or other officer authorized to administer oaths, except a postmaster.

10. If the officer before whom the oath of office and the justification are executed has an official seal he must affix it. If he has not an official seal he must append a certificate that he is authorized to administer oaths, signed by the clerk of a court of record and attested by the seal of the court.

11. The bond must be completely filled out in ink and properly dated.

12. The bond must not be executed on Sunday or a legal holiday.

13. There must be no erasures, alterations, or interlineations in the printed or written matter of the bond.

14. No surety company will be accepted for a sum greater than 10 per cent of its paid-up capital and surplus.

15. The rate of premium charged per $1,000, on this bond and of a like bond in 1908 must be stated. If no such bond was issued during 1908 that fact must be stated.

Wilkie T. Pinkerton-now
Bond sent, ————————.
New Bond sent, ————,
Reasons, ————————.

OATH OF OFFICE.

(This oath need not be executed by a person now in charge as postmaster unless the bond is executed under a reappointment.)

I, Thomas H. Deal, having been appointed postmaster at Fairbanks, in the county of —— and State of Alaska, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter; SO HELP ME GOD.

I do further solemnly swear (or affirm) that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of postoffices and post roads within the United States; and that I will honestly and truly account for and over any money belonging to the said United States, which may come into my possession or control: SO HELP ME GOD.

T. H. DEAL,
(Signature of postmaster.)

Sworn to and subscribed before me, a Notary Public for the Territory of Alaska, this 19th day of November, 1918; and I certify that, to the best of my knowledge and belief the [10] person above named is of an age at which he is competent to contract by deed under the laws of this bond. by deed under the laws on this bond.

[Official Seal] WHITNEY W. CLARKE,
(Signature of officer.)
Notary Public. ——.
(Title.)

Request to report on the sufficiency of individual sureties have been made as follows:
Postmaster, T. H. Deal.
County Clerk, ———.
Chief Inspector, ———.
Investogation showed bond sufficient.
32¢ Documentary stamps. THD.

Fairbanks, Alaska. MC 2000
RENEWED Postal Ag. 12200
4th Quarter 1922. 14,200
24000

Service of the foregoing second amended complaint is accepted by the retention of a *ture* copy thereof.

R. F. ROTH,
Attorney for Defendant Deal.
JOHN A. CLARK,
Attorney for Defendant U. S. F. & G. Co. [11]

[Title of Court and Cause.]

Filed Nov. 25, 1924.

MOTION TO MAKE MORE DEFINITE AND CERTAIN (UNITED STATES FIDELITY AND GUARANTY COMPANY).

Comes now the defendant United States Fidelity and Guaranty Company and moves this Court to require the plaintiff to make its second amended complaint more definite and certain in the following particulars, to wit:

1.

To make paragraph VIII more definite and certain by setting forth therein whether the said $9,937.65, referred to in said paragraph, was deposited in cash with the postmaster, or whether it was in the form of a package or parcel, mailed as such.

2.

To make paragraph IX thereof more definite and certain by setting forth therein what particular acts of negligence on the part of T. H. Deal are relied on by the plaintiff as being the cause of the rifling of the registered package therein referred to.

3.

To set forth specifically what particular postal laws and regulations, or postal laws or regulations, were violated by said T. H. Deal, the violation of which is relied on as the cause of the loss of the money referred to, and to state particularly in what way said T. H. Deal was negligent, and in what way he disregarded postal laws and regulations. [13]

4.

To make paragraph X more definite and certain by setting forth specifically therein what failure, refusal, or neglect of postmaster T. H. Deal to perform his duties as such postmaster, prior to said alleged depredation, on said registered package, is relied on by the plaintiff as being one of the causes, or the cause, for the loss of said money.

5.

To set forth specifically what obligation set forth in the bond sued on was violated by said T. H. Deal.

6.

To set forth specifically how and wherein said T. H. Deal failed to perform, observe, or discharge the duties and trusts imposed on him by law and the

regulations of the Postoffice Department, in reference to said registered package, relied on as breaching said bond.

7.

To set forth specifically in what way said T. H. Deal failed and neglected, or failed or neglected, to use ordinary care in handling said registered package.

8.

To set forth specifically in what way said T. H. Deal, as postmaster, neglected properly to protect and safeguard the registered package or registered mail matter.

9.

To set forth in what way said T. H. Deal violated the law and regulations of the Postoffice Department in handling said registered package.

10.

To set forth specifically the carelessness or negligence referred to and relied on as being in disregard of the laws and [14] regulations of the Postoffice Department, and especially what particular acts of carelessness or negligence are relied on as violating sections 361, 524, 940, and 1015 of the regulations of the Postoffice Department, promulgated in the year 1913, and what particular part of said regulations is claimed to have been violated.

Dated at Fairbanks, Alaska, on this the 24th day of November, A. D. one thousand nine hundred twenty-four.

JOHN A. CLARK,
Attorney for Defendant United States Fidelity & Guaranty Company.

Due service hereof admitted this 25 November 1924.

E. B. COLLINS,
Sp. Ass't U. S. Atty.,
Attorney for Plaintiff. [15]

[Title of Court and Cause.]

Filed Nov. 25, 1924.

MOTION TO MAKE MORE DEFINITE AND CERTAIN (T. H. DEAL.)

Comes now the defendant T. H. Deal and moves the Court as follows, to wit:

I.

That paragraph IX of the second amended complaint be made more definite and certain, to wit: That the specific act or acts of negligence of the said defendant T. H. Deal which caused or resulted in the opening and rifling of the registered package referred to in said second amended complaint; and also in what particular the said defendant T. H. Deal disregarded the postal laws and regulations; and also that said paragraph IX be made more definite and certain by stating whether or not

the said defendant T. H. Deal, or any of his employees in said postoffice, knew that the registered package set forth and described in said second amended complaint contained currency, and whether or not the said defendant T. H. Deal, or any of his employees in said postoffice, knew that [16] currency, or any of the contents of the said registered package, was the property of the United States.

II.

That paragraph X of said second amended complaint be made more definite and certain by setting forth specifically in what manner the said defendant T. H. Deal as postmaster failed, refused or neglected to perform his duty as such with reference to said registered package of mail, or how he violated the obligation of the bond set forth in said second amended complaint, or the writing obligatory referred to in paragraphs IV, V and VI, or in either or any of said paragraphs of the said second amended complaint; also in what manner, and in particular how, the said defendant T. H. Deal as said postmaster failed to observe or perform or discharge the duties or trusts imposed upon him by law and the regulations of the Postoffice Department with reference to said registered package; and in what particular and in what manner the said defendant T. H. Deal as such postmaster failed or neglected to use ordinary care in handling the said registered package; or in what particular or in what manner the said defendant T. H. Deal as such postmaster failed or neglected to properly or

otherwise protect and safeguard said registered package as registered mail matter; and in what particular and in what manner the said defendant T. H. Deal as such postmaster failed or neglected to handle said registered package as such in the manner prescribed by law and the regulations of the Postoffice Department; and in what manner and in what particular the said defendant T. H. Deal as such postmaster handled the same in a careless or negligent manner, or in utter or any disregard of the [17] law or of the regulations of the said Postoffice Department; and in what particular and in what manner the said defendant T. H. Deal as such postmaster disregarded, negligently or otherwise, sections 361, 524, 940 and 915, or either or any of them; and in particular what particular clause of either or any of said sections was disregarded by the said defendant T. H. Deal in the handling of said registered package.

R. F. ROTH,
Attorney for Defendant, T. H. Deal.

Service of a copy of the foregoing motion accepted this 25th day of November, 1924.

E. B. COLLINS,
Sp. Ass't U. S. Atty. [18]

[Title of Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION TO MAKE MORE DEFINITE AND CERTAIN.

Now on this day, this matter came on regularly

for hearing on the defendant's motion to make the second amended complaint more definite and certain, the defendant, T. H. Deal appearing by and through his counsel, R. F. Roth, Esq., The United States Fidelity and Guaranty Co. of Baltimore, Maryland, being represented by John A. Clark, Esq., Fred D. Crane, Esq., Assistant United States Attorney, appearing for and in behalf of the United States. Argument to the Court was had by respective counsel and the Court being fully and duly advised in the premises,—

IT IS ORDERED that the defendant's motion to make the second amended complaint more definite and certain be and they are hereby denied.

Entered in the Court Journal No. 16, page 200, Dec. 9, 1924. [19]

[Title of Court and Cause.]

Filed Dec. 15, 1924.

DEMURRER TO SECOND AMENDED COMPLAINT (T. H. DEAL).

Comes now the defendant T. H. Deal and demurs to plaintiff's second amended complaint on file herein upon the ground that said complaint does not state facts sufficient to constitute a cause of action against this defendant.

WHEREFORE defendant prays that said action be dismissed and that plaintiff take nothing herein.

R. F. ROTH,

Attorney for Defendant T. H. Deal. [20]

[Title of Court and Cause.]

Filed Dec. 16, 1924.

DEMURRER TO SECOND AMENDED COMPLAINT (UNITED STATES FIDELITY AND GUARANTY COMPANY).

Comes now the defendant United States Fidelity and Guaranty Company, a corporation, and demurs to plaintiff's second amended complaint on file herein, on the following grounds, to wit:

1.

That the matters and things therein contained do not constitute a cause of action against this defendant.

2.

That there is nothing set forth in said second amended complaint to show that this defendant was liable in any way for any alleged damage suffered by plaintiff therein.

3.

That there is a defect of parties plaintiff, in that said second amended complaint shows that the plaintiff therein is not the real party in interest.

WHEREFORE this answering defendant prays that plaintiff take nothing by its said alleged cause of action and that this defendant go hence with its costs incurred herein.

Dated at Fairbanks, Alaska, this 16 day of December, A. D. one thousand nine hundred twenty-four.

JOHN A. CLARK,
Attorney for Def't U. S. F. & G. Co.

Due service hereof admitted this 16 Dec. 1924.

FRED D. CRANE,
Attorney for Plaintiff. [21]

[Title of Court and Cause.]

ORDER OVERRULING DEFENDANTS' DEMURRERS TO SECOND AMENDED COMPLAINT.

Now on this day this cause came on regularly for hearing on defendants' demurrers to the second amended complaint herein, R. F. Roth, Esq., appearing for and in behalf of the defendant T. H. Deal, John A. Clark, Esq., appearing for and in behalf of the defendant, The United States Fidelity and Guaranty Company of Baltimore, Maryland, the United States being represented by Fred D. Crane, Esq., Ass't. United States Attorney.

Argument to the Court was had by respective counsel and the Court having heard the arguments and being fully and duly advised in the premises,

IT IS ORDERED that the defendants' demurrers to the second amended complaint be and they are hereby overruled.

(Clerk's note, to which the defendant T. H. Deal excepts and the defendant, The United States Fidelity and Guaranty Company of Baltimore, Maryland, excepts, and the exceptions are allowed by the Court.)

Entered in Court Journal No. 16, page 213, Dec. 24, 1924. [22]

[Title of Court and Cause.]

Filed Jan. 2, 1925.

ANSWER (UNITED STATES FIDELITY AND GUARANTY COMPANY).

Comes now United States Fidelity & Guaranty Company, a corporation, one of the defendants above named, and for answer to plaintiff's second amended complaint on file herein, admits, denies, and alleges as follows, to wit:

1.

Answering the allegations of paragraph 1 of said second amended complaint, this answering defendant alleges that it has no knowledge or information as to the matters and things therein contained sufficient to enable it either to admit or to deny the same.

2.

Admits the allegations of paragraphs 2, 3, 4, 6, and 7.

3.

Answering the allegations of paragraph 8, this defendant denies that the obligation of said T. H. Deal was other than as contained in his official bond and oath of office, copies of which are set forth in said second amended complaint.

4.

Answering the allegations of paragraph 8, this answering defendant alleges that it has no knowledge or information as to the matters and things therein contained sufficient to enable it to form a

belief, and basing its denial on such lack of information and belief, [23] denies the same.

5.

Answering the allegations of paragraph 9, this answering defendant denies the same.

6.

Answering the allegations of paragraph 10, this defendant alleges that it has not sufficient information or knowledge to enable it to form a belief in regard to the matters therein set forth, and basing its denial on such lack of information and belief, denies the same.

7.

Answering the allegations of paragraph 11, this defendant admits that demand has been made on this answering defendant for the sum of ninety-nine hundred dollars and that this defendant has refused, and does now refuse, to pay the same.

8.

Denies that, by reason of the matters and things set forth in said second amended complaint, plaintiff has suffered a loss of ninety-nine hundred dollars.

9.

Denies that there is any sum whatever due and owing or due or owing from this defendant to plaintiff.

10.

Answering the allegation that demand was made on the defendant T. H. Deal, this answering defendant alleges that it has no knowledge or information in regard thereto sufficient to enable it to

form a belief, and basing its denial on such lack of information and belief, denies the same.

11.

For a further affirmative defense to plaintiff's second amended complaint, this answering defendant alleges that the plaintiff in the above-entitled action is not the real party in interest and said [24] action is not instituted or prosecuted by the real party in interest, and said action, if maintainable at all, would be maintainable by the Alaska Engineering Commission.

WHEREFORE this answering defendant prays that plaintiff take nothing by its said action; that said action be dismissed; and that this answering defendant go hence with its costs incurred herein.

JOHN A. CLARK,

Attorney for Defendant U. S. Fidelity & Guaranty Company, a Corporation.

United States of America,
Territory of Alaska,—ss.

E. H. Mack, being first duly sworn, on oath deposes and says:

I am attorney-in-fact for the United States Fidelity & Guaranty Company, a corporation, none of whose officers reside in the Territory of Alaska, and I make this verification on behalf of said corporation; I have read the foregoing answer, know the contents thereof, and I verily believe the same to be true.

E. H. MACK.

Subscribed and sworn to before me on this the 31st day of December, A. D. one thousand nine hundred twenty-four.

[Seal] JOHN A. CLARK,
Notary Public in and for the Territory of Alaska.

My Commission expires 24 April, 1926.

Due service hereof admitted this 31 December, 1924.

_____,
Attorney for Plaintiff.

Copy left at Dist. Attys. Office 2:10 P. M. Dec. 31, 1924—no one to accept service.

JOHN A. CLARK. [25]

[Title of Court and Cause.]

Filed Jan. 6, 1925.

ANSWER (T. H. DEAL).

Comes now the defendant T. H. Deal and answering plaintiff's second amended complaint, alleges and denies as follows:

I.

Answering paragraph I of said second amended complaint, answering defendant states that he has not sufficient knowledge or information thereof to form a belief, and for that reason denies each and every allegation contained therein.

II.

Answering paragraph VIII of said second amended complaint this answering defendant denies that on the 15th day of September, 1921, or

at any other time, the First National Bank, a banking corporation of Fairbanks, Territory of Alaska, through its proper, or any, officer or employees, deposited in the United States postoffice at Fairbanks, [26] Alaska, $9957.65, or any other sum of money of the United States, and property of the United States, but admits that said bank deposited in said postoffice a registered package addressed to the Special Disbursing Officer of the Alaska Engineering Commission at Healy, Alaska, and that said package or parcel was properly addressed, postage prepaid, and registered by an employee of said bank, but denies that said registered package was marked in any manner showing that it contained money or currency, or that it contained anything which was the property of the United States; and alleges that he has not sufficient knowledge or information thereof to form a belief, and for that reason denies that said registered package contained any money or currency whatever.

III.

Answering paragraph IX of said second amended complaint, this answering defendant denies each and every allegation contained therein.

IV.

Answering paragraph X of said second amended complaint, this answering defendant denies each and every allegation contained therein.

V.

Answering paragraph XI of said second amended complaint, this answering defendant admits that demand was made upon him by plaintiff for the

sum of $9,900.00 and that he refused to pay the same, and still refuses to pay the same, but denies each and every other allegation contained therein.

WHERFORE, defendant T. H. Deal prays judgment against plaintiff that plaintiff take nothing herein against [27] him, the said T. H. Deal, and for his costs and disbursements herein expended.

R. F. ROTH,
Attorney for Defendant T. H. Deal.

United States of America,
Territory of Alaska,—ss.

T. H. Deal, being first duly sworn, deposes and says: That he is one of the defendants named in the foregoing answer, that he has read the foregoing answer, knows the contents thereof, and that the same is true as he verily believes.

T. H. DEAL.

Subscribed and sworn to before me this 5th day of January, 1925.

[Seal] R. F. ROTH,
Notary Public for Alaska.

My Commission expires Nov. 14, 1925.

Service of a copy of the foregoing answer admitted this 6th day of January, 1925.

JULIEN A. HURLEY,
Of Attorneys for Plaintiff. [28]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

Service accepted May 4, 1925.

J. A. H.

Filed May 4, 1925.
Filed May 8, 1925. [29]

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[Title of Court and Cause.]

BE IT REMEMBERED that heretofore and on, to wit, February 16, 1925, at 10:00 o'clock A. M., the above-entitled cause came on for trial in the above court before the Honorable Cecil H. Clegg, Judge of said court, and a jury.

The plaintiff appeared by Julien A. Hurley, Esq., U. S. District Attorney, and Fred D. Crane, Esq., Assistant U. S. District Attorney, its attorneys and counsel.

The defendant T. H. Deal appeared in person and by R. F. Roth, Esq., his attorney and counsel.

The defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, appeared by John A. Clark, Esq., its attorney and counsel.

Whereupon the following proceedings were had and done, to wit: [34—5]

(Examination of jury.)

Whereupon an adjournment was taken until Monday, February 16, 1925, at 2:00 o'clock P. M.

AFTERNOON SESSION.

Monday, February 16, 1925, 2:00 P. M.

(Examination of jury resumed.)

(Jury duly empaneled and sworn.)

(Opening statement by respective counsel to the jury.)

Mr. CRANE.—If the Court please, I want to offer and get in the record a photostatic copy of the bond and oath of office of the postmaster. It has already been admitted in the pleading, but I desire to offer a photostatic copy duly certified.

Mr. ROTH.—We object to it on the ground it is admitted in the pleadings just as it is pleaded, and it simply encumbers the record. We don't deny it. It is admitted in the pleadings. It is affirmatively admitted in the pleadings. [35—6]

The COURT.—If that is the case I can't see the object in introducing it, Mr. Crane.

Mr. CRANE.—Very well.

TESTIMONY OF FRANK T. DONER, FOR PLAINTIFF.

FRANK T. DONER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. You may state your name.

A. Frank T. Doner.

(Testimony of Frank T. Doner.)

Q. Where do you reside, Mr. Doner?

A. At present?

Q. Where do you reside at present, yes?

A. At Aberdeen, Washington.

Q. Where were you residing on the 15th of September, 1921? A. At Healy, Alaska.

Q. And what was your occupation at that time?

A. I was Special Disbursing Agent for the Alaskan Engineering Commission.

Q. And you had been for some time?

A. I had been since September, 1918.

Q. Mr. Doner, I will ask you if on or about the 13th or 14th, 15th—

Mr. CLARK.—(Interrupting.) One moment, if the Court please, before going any further. I want to save my record. I object, if the Court please, to the introduction of any testimony in this case upon the ground that the complaint on file, [36—7] the second amended complaint on file in this cause, does not set forth a cause of action against either of the defendants in this action.

The COURT.—The objection will be overruled.

Mr. CLARK.—To which we note an exception.

The COURT.—Exception allowed.

Q. (Question read, and continuing.) —of September, 1921, you ordered some money to be shipped to you from the bank at Fairbanks, Alaska, and if so, how much?

Mr. ROTH.—We object to that on the ground the same is irrelevant, incompetent and immaterial; that any order that he might have made prior to

(Testimony of Frank T. Doner.)

this transaction can have no binding effect upon Mr. Deal, the defendant Mr. Deal, in any manner whatever.

The COURT.—Objection overruled.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

A. Why, I ordered at that time $9,937.65 through the First National Bank.

Q. At Fairbanks? A. At Fairbanks.

Q. Did you ever receive that amount of money?

A. No, sir.

Q. Whose money was it?

Mr. ROTH.—We object to that, if the Court please, upon the ground the same is irrelevant, incompetent and immaterial, calling for a conclusion of the witness, and cannot in any way bind the defendants in this action.

The COURT.—Objection sustained. [37—8]

Mr. CRANE.—Exception.

The COURT.—Exception allowed.

Q. Mr. Doner, in your position as Disbursing Agent of the Alaska Engineering Commission at Healy, Alaska, did you have any moneys of the Government of the United States under your control?

Mr. ROTH.—That is objected to on all of the grounds last stated, if the Court please, and on the further ground it can have no binding effect whatever, it can't tend to prove or disprove any fact in issue in this case.

The COURT.—Overruled.

(Testimony of Frank T. Doner.)

Mr. ROTH.—Exception.

The COURT.—Exception allowed.

Mr. CLARK.—The appearances are separate here for the two defendants, and I would ask, if the Court please, it is understood any objection made by either of the defendants is on behalf of both defendants. That will save separate objections being made.

The COURT.—Very well.

Mr. ROTH.—The same with reference to exceptions.

The COURT.—Very well.

Q. (Question read.)

A. I did.

Q. I will ask you, Mr. Doner, if the money that presumably left the bank—I will change that. I will ask you if the money which failed to arrive and was sent from the bank at Fairbanks, Alaska, was property of the United States Government?

A. Yes, sir. [38—9]

Mr. ROTH.—Mr. Doner, please don't answer when I am trying to object. We ask that the answer be stricken until we object, if the Court please.

The COURT.—It may be stricken.

Mr. ROTH.—We object to the question, if the Court please, upon the ground the same is incompetent, irrelevant and immaterial, does not tend to prove or disprove any fact in issue in this case, and is assuming something that has not yet been proven, to wit, that money left the bank.

(Testimony of Frank T. Doner.)

The COURT.—Objection sustained.

Q. Mr. Doner, as disbursing agent of the Alaskan Engineering Commission did you have in your custody at Healy, Alaska, a large amount of money?

Mr. ROTH.—That is objected to on the ground the same is incompetent, irrelevant and immaterial.

Mr. CRANE.—If the Court please, I wish to call the Court's attention to the fact they have denied in their answer the Government is a party in interest or the Government sustained the loss, and I am attempting to show this by this witness.

Mr. ROTH.—If the Court please, that doesn't tend to prove the fact stated by counsel. If he has any money out there at Healy I don't see that would prove this money belonged to the Government.

Mr. CRANE.—I might state to the Court this is only preliminary to the fact I will lead up to in a few minutes. [39—10]

The COURT.—I think possibly the ownership can be shown by showing what the facts are.

Mr. CRANE.—That is what I am attempting to do, if the Court please. What was the Court's ruling on that?

The COURT.—Sustain the objection.

Q. Mr. Doner, was it your practice at Healy, Alaska, to cash checks and time checks for employees of the Alaska Engineering Commission?

Mr. ROTH.—That is objected to on the ground the same is irrelevant, incompetent and immaterial;

(Testimony of Frank T. Doner.)

it doesn't prove or tend to prove any fact in issue in this case; that it can have no binding effect whatever upon either of the defendants in this action.

The COURT.—Overruled. I presume it is preliminary.

Mr. ROTH.—We desire an exception.

The COURT.—Exception allowed.

A. Yes, sir.

Q. I will ask you if about the 14th, 13th or 14th day of September you sent some checks, and if so to what amount, to the First National Bank at Fairbanks, Alaska?

Mr. ROTH.—That is objected to on the ground the same is irrelevant, incompetent and immaterial; it can have no binding effect whatever upon these defendants, or either of them, whether they did or whether they did not.

The COURT.—Objection overruled.

Mr. ROTH.—Exception.

The COURT.—Exception allowed.

A. I sent $9,937.65 in checks to the First National Bank to [40—11] be exchanged for currency.

Q. Now these checks that you sent, state who they belonged to.

Mr. ROTH.—We object to that on all of the grounds last stated.

The COURT.—Objection overruled.

Mr. ROTH.—Exception.

The COURT.—Exception allowed.

A. Belonged to the United States Government.

(Testimony of Frank T. Doner.)

Q. And how did the United States Government come in possession of these checks?

Mr. ROTH.—That is objected to on all of the grounds last stated.

The COURT.—Overruled.

Mr. ROTH.—Exception.

The COURT.—Exception allowed.

A. Why, I cashed them from my cash fund, the fund that belonged to the United States Government.

Q. Did you ever receive as a return for these checks the $9,937.00 that you sent for?

A. No, sir.

Q. To your knowledge has it ever been received?

A. Why, the nine thousand nine hundred never has been to my knowledge.

Q. And do you know of your own knowledge, Mr. Doner, who sustained the loss of $9,900.00?

Mr. ROTH.—That is objected to on the ground the same is irrelevant, incompetent and immaterial if he knows or if he doesn't know.

Mr. CRANE.—It is denied in your answer whose property it is, Mr. Roth. [41—12]

Mr. ROTH.—And this will not prove or tend to prove any fact in issue in this case.

The COURT.—Overruled.

Mr. ROTH.—Exception.

The COURT.—Exception allowed.

A. The United States Government.

Q. I will ask you one other question, Mr. Doner.

(Testimony of Frank T. Doner.)

Was it your custom at that time to ship your payrolls by registered mail?

Mr. ROTH.—That is objected to on the ground the same is irrelevant, incompetent and immaterial.

The COURT.—Through the postoffice, you mean?

Mr. CRANE.—Yes.

The COURT.—Objection overruled.

Mr. ROTH.—Exception.

The COURT.—Exception allowed.

A. Yes, sir, that had been our method.

Q. About how many shipments had you made up to this time through the postoffice from Fairbanks, Alaska, to Healy, if you know, by registered mail?

Mr. ROTH.—That is objected to on the ground the same is irrelevant, incompetent and immaterial. The proper foundation has not been laid for the introduction of the testimony if it is intended to be binding at all upon Mr. Deal as postmaster at that time unless it is first shown the matter was brought to the knowledge of Mr. Deal.

The COURT.—Objection overruled.

Mr. ROTH.—Exception.

The COURT.—Exception allowed.

A. Well, I have no idea as to the amount, but we used to [42—13] cash a large percentage of our checks there, there being no bank, and as soon as I got an accumulation I sent them right up to the bank here in exchange for currency. I would do that very frequently.

Mr. CRANE.—You may inquire.

(Testimony of Frank T. Doner.)

The COURT.—How would they send it back to you, the currency?

A. By registered mail.

Mr. ROTH.—No questions.

(Witness excused.)

Mr. CRANE.—If the Court please, I would like to ask to read the deposition of Mr. George Hutchinson taken here in this case. It is filed with the papers.

The COURT.—Very well.

(Deposition read as follows:)

[Title of Court and Cause.] [43—14]

DEPOSITION OF GEORGE HUTCHINSON, FOR PLAINTIFF.

BE IT REMEMBERED that on this 10th day of November, 1924, at the hour of 2:00 o'clock P. M. (pursuant to the stipulation hereto attached entered into between counsel for the respective parties), before the undersigned, a notary public in and for the Territory of Alaska, appeared Fred D. Crane, Esq., Deputy United States Attorney and of counsel for plaintiff, R. F. Roth, attorney for defendant T. H. Deal, and John A. Clark, attorney for defendant United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, in the above-entitled action; and George Hutchinson, the witness named in said stipulation; whereupon the following proceedings were had and done, to wit:

(Deposition of George Hutchinson.)

GEORGE HUTCHINSON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. Mr. Hutchinson, you will state your name, and your residence and your occupation.

A. George Hutchinson; Fairbanks; president of the First National Bank of Fairbanks.

Q. Were you connected with the First National Bank during the month of September, 1921?

A. Yes.

Q. Were you present in the bank on the 15th day of September, 1921, or do you remember?

A. I was.

Q. And what was your position with the bank at that time? [44—15]

A. Well, I was vice-president at that time.

Q. Do you now recall receiving a message or letter from the disbursing officer of the Alaska Engineering Commission regarding a shipment of some money? A. Yes, I have the letter here.

Q. Just state what was received.

Mr. ROTH.—We wish to object to this on the ground the same is irrelevant, incompetent and immaterial.

The COURT.—Objection overruled.

Mr. ROTH.—Exception.

The COURT.—Exception allowed.

A. (Reading:) "September 10th, 1921. To the

(Deposition of George Hutchinson.)

First National Bank, Fairbanks. Gentlemen: Enclose checks to the amount of $9,937.65, for which please send currency as follows: Five thousand in twenties, three thousand in tens, nineteen hundred in fives, and balance in quarters." That means silver.

Q. Where was that letter received from?

A. That is dated Healy, Alaska, September 10th.

Q. And who is it signed by?

A. Frank Doner, Special Disbursing Agent.

Q. Of what?

A. Well, it is the Alaska Engineering Department, Department of the Interior, or Alaskan Engineering Commission.

Q. And in response to that request or letter did you ship the ninety-nine hundred dollars in currency, or $9,937.65 to be exact?

A. On September 15th I deposited in the postoffice—here is my letter to Mr. Frank Doner, Special Disbursing [45—16] Agent, Healy, via Nenana, Alaska. There was no postoffice at Healy so we registered this to Nenana.

Mr. ROTH.—What date is that?

The WITNESS.—September 15th.

Mr. ROTH.—We object to this on the ground the same is irrelevant, incompetent and immaterial.

The COURT.—Overruled.

Mr. ROTH.—Exception.

The COURT.—Exception allowed.

A. (Continuing.) "Dear Sir: Yours 10th inst. to hand with checks amounting to $9,937.65 en-

(Deposition of George Hutchinson.)

closed. We are forwarding under separate cover, registered mail, the following; 20's, currency, $5,000.00; 10's, currency, $4,000.00; 5's, currency, $900.00; silver, $37.65. Kindly acknowledge receipt of money and oblige. Yours truly, George Hutchinson, Vice-president."

Q. Now, Mr. Hutchinson, did you personally make up this package of money referred to here?

A. I did. I can give you a detailed account of the transaction from the time it came in until the time it went out.

Q. If you will.

A. This was received here on Wednesday morning, September 14th, 1921.

Mr. ROTH.—You say "this"; you mean that letter? A. The checks.

Mr. ROTH.—Oh, the checks.

A. (Continuing.) The checks were received. I have a list here of all the checks. Received on Wednesday morning, September 14, 1921. It came in the mail of Tuesday, September 13, 1921. Now at that time our regular [46—17] teller, Mr. Eddy Stroecker, was on a vacation and I was handling the business at that window in his place. I took the list of checks and checked them all off to see that they were all O. K., and counted out the money, the $9,937.65, and put it in a sack, a canvas sack, but didn't seal it at that time. The reason for that was that I didn't want to seal it up until after the close of the day's business and to see whether the cash balanced. Now the cash

(Deposition of George Hutchinson.)

balanced all right that night—but I didn't do anything more with it, I left it in the safe where I had put it until the next day, because we never registered it out until the evening before, the day before the mail went. The mail went on Friday, so on Thursday, about noon, I got this sack out, and I called George Bentley, who was then doing bookkeeping work for us, I called him over and I said to him, "George," I said, "you go into the back room and get some wrapping paper and come over here and wrap up some money for me." You see, he went into the other cage, and, as you know, the cages are just exactly the same as it is now, and he went into the other cage opposite me, and I took this money out of the sack, and while I didn't count the individual bills in the particular bundles, I counted out the aggregate. There might have been a package of two thousand, or one thousand. I counted them all up, all the money out before him in the packages, the $9,937.65, and there was nine thousand nine hundred in currency and thirty-seven sixty-five in silver, and I put it in the sack in his presence, and I sealed it with a lead seal and put the tag on it, and he went right over to the postoffice [47—18] with it and was only gone long enough to bring back the receipt. That's the whole transaction.

Q. The package was intact, was it, at the time it left the bank?

A. The package was intact and sealed and I had counted the packages of mony. *There* were just

(Deposition of George Hutchinson.)

the same as they were when I put them away; nobody had access to them.

Q. Have you the registry receipt?

A. I have (producing paper).

Mr. ROTH.—It might be well to read this.

A. (Continuing.) It is a covered by registry receipt No. 1045 issued by the Fairbanks postoffice on September 15, 1921, addressed to Frank Doner, Nenana, Alaska.

Q. The regular postage was paid on all of this, was it not?

A. No, I don't think we paid any postage on it.

Q. Just the registry fee?

A. A registry fee. I don't think we paid any postage on it.

Mr. CRANE.—That's all.

Cross-examination.

(By Mr. ROTH.)

Q. Mr. Hutchinson, on this day that you sent that money over to the postoffice who were present as employees or officers in the bank during this transaction that you speak of?

A. I don't remember whether there was anybody else in there or not. It was about the noon hour.

Q. Well, when you received this letter from Mr. Doner enclosing those checks what was done with that letter? A. With this letter? [48—19]

Q. Yes. It was filed away, I presume?

A. I presume it was filed away.

(Deposition of George Hutchinson.)

Q. Where would it be filed?

A. Of course, I have got it here.

Q. Well, I know. A. Well, the regular filing.

Q. Who has access to those files?

A. We all have access to them.

Q. Who had at that time, that's the idea?

A. Let me see. Miss Salladay, and George Bentley, and Mr. Hess,—

Q. (Interrupting.) That is Luther C. Hess?

A. Yes. I guess that was all.

Q. What is the date that you sent the money over to the postoffice? Was that the 15th or the 14th?

A. No, that was the 15th, Thursday the 15th. Friday was mail day. Of course, I will tell you. Now this letter may not have been filed in the regular file, see, because sometimes in a case of this kind, why, I held the letters out in my special file until I got acknowledgement of them. Chances are this didn't go in the regular files but was with my paper on my desk until we got—so as to hold it until that acknowledgment, see. Then, of course, the next morning—the chances are it never went into the regular file; I am satisfied that it didn't. And, of course, when there was trouble I dug up all the correspondence, kept all the correspondence in a separate envelope.

Q. Which was proper, of course. Now, Mr. Hutchinson, during the time that you were talking to George Bentley, or with anyone else, about this

(Deposition of George Hutchinson.)

money that was to be [49—20] shipped, or about the letter that you had received from Mr. Doner concerning these checks that you had received and concerning your sending this money, do you remember now of anyone being on the outside of the counters of the bank during any of these conversations?

A. No, I don't remember.

Q. Could have been?

A. Oh, there could have been, but then we wouldn't — I am sure I didn't mention — I don't think that I mentioned where I was going to send the money or anything of that kind.

Q. But supposing, now, that it had been the purpose of someone who was watching for evidence of a shipment of money by the bank, do you think that it might not have happened that someone in the lobby of the bank—is that what you call it, the outside? A. Yes.

Q. Overheard about the shipment of this money?

A. Might have been possible that someone saw Bentley going over to the postoffice with a package that looked like currency.

Q. Yes, or someone might have heard you talking about it?

A. Oh, somebody might have heard us talking.

Q. Or making it up in the cage there when you wrapped it up at the time you delivered it to George Bentley? A. Might be possible.

Q. You haven't any recollection of anyone being there now at this time?

(Deposition of George Hutchinson.)

A. No. My recollection is there was nobody in at the time, but I wouldn't swear to that, but it was very quiet, because I wouldn't send him over—[50—21]

Q. (Interrupting.) Was Miss Salladay in there at that time?

A. I don't think so. I think she was out to lunch. I wouldn't be so sure about that, but I don't think so. It is possible that she might have been in there.

Mr. ROTH.—I guess that's all.

Redirect Examination.

(By Mr. CRANE.)

Q. One other question that I forgot. Was that a new bag that you shipped that currency in?

A. No, I don't think so. I think it was an old bag. I don't think so. It might have been, but I don't think so. I don't remember that part of it, Mr. Crane. They got the bag, haven't they? I think they have got the bag in evidence. That will show whether it is new or not.

Mr. CRANE.—That's all.

Recross-examination.

(By Mr. CLARK.)

Q. Is there any stamp on those bags you send out, that is, the bank's name put on it or a stencil on it?

A. Well, we had some with the name on it, but we get sacks from other banks from the outside that send money in here, and sometimes we might use

(Deposition of George Hutchinson.)

one of them. But the sack will show itself whether it was one of ours or not.

Q. How was it sealed?

A. Sealed with a lead seal.

Q. And any other kind of sealing on it?

A. No.

Q. The top would be closed and bound probably with a wire? [51—22]

A. No, it is bound with twine, heavy twine. It is the best seal that's made. You can see the seal over there. It can't possibly be opened. Well, it wasn't opened anyway; at least the seal wasn't attempted to be opened.

Q. Have you seen the package since the package was rifled, have you seen the bag itself?

A. No. Only what I have heard, hearsay.

(Recess.) [52—23]

TESTIMONY OF EVALYN HOUCK, FOR PLAINTIFF.

EVALYN HOUCK, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. Your name is Evalyn Houck? A. It is.

Q. And you reside in Fairbanks, do you, Miss Houck? A. Yes.

Q. Lived here for some time? A. Yes.

Q. Miss Houck, were you in Fairbanks on the 15th of September, 1921? A. Yes.

(Testimony of Evalyn Houck.)

Q. Where were you employed at that time?

A. In the Fairbanks postoffice.

Q. And what was your position in the Fairbanks postoffice at that time? A. I was stamp clerk.

Q. What? A. Register clerk.

Q. Miss Houck, were you present in the postoffice at Fairbanks on September 15, 1921, when Mr. George Bentley, an employee of the First National Bank, brought a parcel there to be registered? A. I was; yes.

Q. And did you register that parcel and give Mr. Bentley the register receipt? A. Yes.

Q. Would you know that parcel again if you would see it, Miss Houck? I will ask you, Miss Houck, if you have [53—24] ever seen this sack before that I now hand you, and if so where did you see it, and what is it, and how do you identify it?

A. It is the package I registered for the bank.

Q. And what was the shape and size of that package to the best of your remembrance at the time that Mr. Bentley gave it to you?

A. It was about that long.

Q. And where was Mr. Bentley when he gave it to you? A. He was at the stamp window.

Q. Where? A. At the stamp window.

Q. And, Miss Houck, did you have any knowledge as to what that parcel contained?

A. Well, I thought it was money. I wasn't sure.

Mr. CLARK.—We ask it be stricken, if the Court please. It was mere surmise.

Mr. ROTH.—It is not responsive to the question.

(Testimony of Evalyn Houck.)

The COURT.—Objection overruled.

Mr. CLARK.—Exception.

The COURT.—Exception allowed.

Q. Miss Houck, what did you next do with that package after you received it from Mr. Bentley and gave Mr. Bentley a registered receipt for it?

A. Put it in a basket right behind me.

Q. In the postoffice at Fairbanks? A. Yes.

Q. How do you identify this sack, Miss Houck?

A. It looks like all the sacks that the First National Bank use, that is all I identify it by. [54—25]

Q. Is there any particular date or marking on it at that time?

A. It has the stamp number of the postoffice when this package was supposed to come in.

Q. What is the date? A. September 15th.

Q. Of what year? A. 1921.

Mr. CRANE.—I wish to offer this in evidence now.

Mr. CLARK.—We object, if the Court please, on the ground there is no foundation laid for its introduction, as it is not shown that it is the same sack in which this money was supposed to have been contained, or that it is in the same condition that it was when she received it.

The COURT.—Objection overruled.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

(Sack referred to received in evidence, marked

(Testimony of Evalyn Houck.)

Plaintiff's Exhibit "A" and made a part of the record herein.)

Q. I will ask you further, Miss Houck, what the condition of this sack was at the time you received it?

Mr. ROTH.—We object to that, if the Court please, on the ground that it is assuming a state of facts that has not yet been proven, to wit, that it is the same sack that she received. She stated merely that she thought it was the same sack because it was one like all of the sacks that the First National Bank sent through the postoffice here. It has not been identified. [55—26]

The COURT.—Objection overruled.

Mr. ROTH.—Note an exception.

The COURT.—Exception allowed.

Q. Very well, Miss Houck, I will ask you if you know what that is (exhibiting book to witness)?

A. It's a carbon copy of the receipt I gave George Bentley for the package.

Q. What is the number on that? A. 1045.

Q. I will ask you what the number is on Plaintiff's Exhibit "A"?

A. 1045 stamped on here.

Q. Did Mr. Bentley register any other packages from the bank that day, if you know?

A. I don't remember.

Q. Now, I will ask you again what the condition of this sack was—examine it—at the time Mr. Bentley gave it to you, if you examined it when he gave it to you?

(Testimony of Evalyn Houck.)

A. I examined it as much as I do any of the registered packages that come in.

Q. What was its condition?

A. So far as I remember it was good, but when I gave the testimony I couldn't remember whether it was a red seal or lead.

Q. What was the condition of the bottom of the sack when you received it?

A. I didn't notice anything the matter with the bottom.

Q. Was it in the same condition it is now?

A. No, it doesn't look the same.

Mr. CRANE.—May I give this to the jury at this time? [56—27]

The COURT.—Yes.

Mr. CLARK.—We call attention to the fact it hasn't been admitted yet.

Mr. CRANE.—I thought it was. I offered it.

The COURT.—Yes, but it hasn't been marked.

Q. Miss Houck, at the time that George Bentley brought this package from the bank and registered it at the registry window state who was present, if you remember?

A. The usual postoffice force were present.

Q. Who was present in the lobby on the outside of the window, if you remember?

A. There were several people out there, but I remember Mr. Ed Smith was standing right behind George Bentley.

Q. Who else, if anyone?

A. Mr. Hoyt was in the lobby.

(Testimony of Evalyn Houck.)

Q. Was there any conversation among anybody there regarding the contents, or about this, that you remember?

A. Mr. Smith said something about it being money.

Q. Mr. Smith said what?

A. Something about it being money in the sack.

Q. Is that all the conversation that you remember about it? What Hoyt do you mean, Romy Hoyt?

A. Yes.

Q. I will ask you, Miss Houck, after putting that in the safe, or after putting that in the registry basket when did you next see this registered parcel?

A. I didn't see it again except when it was checked off.

Q. Did you see it then?

A. Yes, I saw it when it was checked.

Q. What, if anything, did you have to do with the checking of it? [57—28]

A. She just called out the numbers and I checked them off of the packages. I don't remember seeing it.

Q. You mean checked them off on this package?

A. No, the book. You see, we have a book we checked them off on.

Q. I will ask you if you have seen that before (handing book to witness)?

A. Yes, that is where I checked it off.

Q. Is that your writing on there?

A. Yes, that is mine.

Q. Just state to the Court and jury what that is.

(Testimony of Evalyn Houck.)

A. It is a registry bill, and we tear this out and send it along with the registered package.

Q. Is that the bill that you sent along that day with the registered package?

A. Well, after I checked it I didn't tear it out. Miss Smith tears it out and puts it in.

Q. Is that the bill that you checked on that date?

A. Yes.

Mr. CRANE.—I wish to offer this in evidence. I will have it identified by different parties later.

The CLERK.—What part of this do you want introduced?

Mr. CRANE.—I will have it marked for identification, and I will offer it toward the latter part.

(Book referred to marked Plaintiff's Exhibit "B" for Identification.)

Q. Miss Houck, you stated that when you next saw this parcel was when you checked the numbers. I will ask you where the package was at the time you checked the [58—29] numbers on this bill that I just showed you?

A. I don't remember now where it was. I don't remember seeing the package. Miss Smith just called the numbers and I checked them on the book.

Q. Did you see Miss Smith wrap the package up?

A. She just folded it up, I think.

Q. Did you see Miss Smith put the sack in the registry jacket?

A. I am not sure. I don't remember.

Q. Did you see Miss Smith wrap a string around

(Testimony of Evalyn Houck.)

the registered jacket and put the whole package in the safe?

A. I don't remember whether there was string around it or not.

Mr. ROTH.—I can't hear you.

A. (Continuing.) I didn't see where she put it in the safe, but the door wasn't open clear open. The desk is in between and I didn't see where she put it, but I saw her put it in the safe.

Q. Your answer is you saw her put it in the safe?

A. I didn't see where she put it in the safe, though. I stood right behind Miss Smith. I wouldn't know where she put it, but I saw her go back there and put it in the safe, because the door wasn't open wide.

Q. State, if you know, what kind of a jacket it was in at the time as you saw her put it in the safe?

A. It was her regular registry jackets. They were large, about so large (indicating).

Q. A jacket similar to this (indicating)?

A. Yes.

Q. Is this what you mean (indicating)?

A. Yes. [59—30]

Mr. CRANE.—That's all.

Mr. ROTH.—No questions.

(Witness excused.)

TESTIMONY OF LILLIAN G. SMITH, FOR PLAINTIFF.

LILLIAN G. SMITH, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. What is your name?

A. Lillian G. Smith.

Q. Where do you reside, Miss Smith?

A. Fairbanks, Alaska.

Q. What is your occupation?

A. Stamp clerk, Fairbanks postoffice.

Q. What was your occupation on the 15th of September, 1921? A. I was the dispatching clerk.

Q. Where? A. Fairbanks postoffice.

Q. Miss Smith, on that day did you see a parcel, registered parcel from the First National Bank of Fairbanks, Alaska, addressed to Frank Doner, Healy, Alaska, by way of Nenana? A. Yes, sir.

Q. When did you first see it?

A. Along about 3:30, September 15th.

Q. Where? [60—31]

A. Fairbanks postoffice.

Mr. CLARK.—What hour?

A. About 3:30 P. M.

Q. And where did you see it in the postoffice?

A. I first saw it on Miss Houck's desk, that is, at the stamp window.

Q. What did you do with it?

(Testimony of Lillian G. Smith.)

A. I took it from the—from one basket and placed it on my desk and canceled the stamp and put the date on it.

Q. Then go ahead. After that what did you do?

A. Then I placed it in another basket upon the shelf over near my desk, that is, over near the wall, and it must have laid in the basket, oh, maybe an hour or so, when I made up my outgoing registers, and I went through the basket to see how many there, and there was just two, one for Cleary and this one for Nenana.

Q. And what did you do with it then?

A. I billed it, put it on the dispatch-book.

Q. Go ahead. After that what did you do with it?

A. Then I called Miss Houck to check the numbers, which she did. I then placed both articles in a large brown container used as a jacket ordinarily.

Q. And what did you then do with it?

A. Well, I had quite a time getting the package in the envelope, it was so bulky, and in so doing I tore the jacket a little, and I then bound it around with twine, making three or four turns.

Q. Is this the package, if you know, that you handled that day?

A. Yes, sir. It is the same address and the same number, and the same date and the same seal. [61—32]

The COURT.—That is Exhibit "A," is it, that has been introduced in evidence?

Mr. CRANE.—Yes.

(Testimony of Lillian G. Smith.)

A. (Continuing.) And the sack was quite full.

Q. Calling your attention again to Plaintiff's Exhibit "A" that you have in your hand, I will ask you what the condition of that sack was at the time you first saw it and at the time you saw it in your register jacket, and especially what the condition of the bottom of it was, if you examined it?

Mr. ROTH.—Well, if the Court please, I wish to call attention to the fact that the witness stated that that was a container that was used as a jacket, but not a jacket.

Mr. CRANE.—So far as I am concerned it is a jacket when I refer to it, Mr. Roth.

Mr. ROTH.—We object to it, then, as incompetent, irrelevant and immaterial and assuming a state of facts that has not yet been proven.

Mr. CRANE.—Neither one of them in evidence yet. She said she used it as a jacket and container both.

The COURT.—Objection overruled.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

A. What was the question?

Q. (Question read.)

A. I examined the package when it was put on my desk and the bottom was intact and the sack was just as full as it could possibly be, it was just almost square; and I also at the time wondered how they ever got it in there [62—33] without tearing the sack it was so tight.

(Testimony of Lillian G. Smith.)

Q. I will ask you if this jacket that I now hand you is the jacket that you put that Exhibit "A" into, and, if you can tell, tell us how you know it to be so?

Mr. ROTH.—We object to the question upon the ground that it is assuming it is a jacket when, as a matter of fact, it is simply a container and not a jacket.

The COURT.—Objection overruled.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

A. I recognize the writing on the torn corner.

Q. That is the same jacket, is it, that you put the container in? A. Yes, sir; the same jacket.

Q. After putting this exhibit in the jacket what did you next do with the parcel as a whole?

A. Why, I wrapped it right around the middle, just the one way around, several times.

Q. Then what did you do with the package?

A. I then carried it over to the little safe, and I had the heavy end in my hand, and when I threw it on the floor of the safe I expected it to fall right up along the wall of the safe, but being heavy on one end it swung in and the light end swung out.

Q. Did you seal the jacket at that time?

A. No, sir.

Q. When did you next see this jacket containing the parcel? A. The morning of September 16th.

Q. Where did you get it?

A. Out of the little safe. [63—34]

(Testimony of Lillian G. Smith.)

Q. Before that, I will ask you when you put it in the safe that evening state whether or not you locked the safe?

A. I turned the knob of the combination about three points.

Q. Well, what is that combination called?

A. Day combination.

Q. When you took the parcel out of the safe the next morning what combination did you use to open the safe? A. The day combination.

Q. And what did you do with the parcel, package, when you took it out of the safe that morning?

A. Carried it over to the Nenana pouch, which is near the scales.

Q. Who was present in the postoffice at that time? A. Mr. Deal and myself.

Q. At that time did you untie the string?

A. No, sir.

Q. Around the package and examine the parcel?

A. No, sir.

Q. Did Mr. Deal do so in your presence?

A. No, sir.

Q. To your own knowledge do you know whether or not the jacket was opened and the contents examined before it was put in the sack?

A. No, sir.

Q. It was not? A. No, sir.

Q. After the package was put in the sack I will ask you what was done with the sack, if you know?

A. After the package was put in the pouch the pouch was weighed, and I then went over to the

(Testimony of Lillian G. Smith.)

case and put the weight on the bill, came back and dropped the bill in [64—35] the pouch and Mr. Deal locked the safe, or the pouch.

Q. Who was the mail pouch delivered to that morning? A. To Mr. Lillico.

Q. You may state whether or not it was locked when delivered to Mr. Lillico?

A. Yes, sir, it was.

Q. You may state whether or not it was locked when it left the postoffice? A. Yes, sir.

Q. Was it in good condition? A. Yes, sir.

Mr. CRANE.—I will ask to have this marked as Plaintiff's Exhibit "C."

Mr. CLARK.—We have no objection.

The COURT.—It may be so marked.

Q. You examined this and this is your writing on here, Miss Smith? A. Yes.

Mr. CRANE.—I offer this in evidence, if the Court please.

The COURT.—Any objection?

Mr. CLARK.—No.

The COURT.—It may be admitted.

(Jacket referred to received in evidence, marked Plaintiff's Exhibit "C" and made a part of the record herein.)

Q. I will ask you if you have ever seen this instrument marked Plaintiff's Exhibit "B" for Identification (handing same to witness)? If so, state what it is.

A. It is a registry bill and my writing and Mrs. Houck's signature as a witness.

(Testimony of Lillian G. Smith.)

Q. Is that the registry bill that refers to the package [65—36] register number 1045 in this action? A. Yes, sir.

Q. That is the same bill, is it?

A. Yes, sir, it is.

Q. Miss Smith, how long have you been employed in the postoffice?

A. Well, in the Fairbanks postoffice since 1919.

Q. During the time you were in the Fairbanks postoffice working for Mr. Deal state whether or not you had the combinations to any of the safes in the postoffice?

A. I had the day combination to the little safe only up to September 15, 1921.

Q. Was that the only combination that you used?

A. Yes, sir.

Q. I will ask you if you know whether or not the combination of the little safe was changed or not while you were in the postoffice? A. Yes.

Mr. CLARK.—We object, if the Court please, as immaterial.

Mr. CRANE.—I believe it is material, your Honor. It is covered by one of the regulations alleged to have been violated in this case.

The COURT.—I think you ought to confine your question to some particular time.

Mr. ROTH.—I, on behalf of Mr. Deal,—

Mr. CRANE.—(Interrupting.) I will change the form of the question.

Mr. ROTH.—All right.

(Testimony of Lillian G. Smith.)

Q. While you were working for Mr. Deal in the postoffice at Fairbanks, Alaska, and prior to the rifling of this [66—37] package, I will ask you to state whether or not the combination to the small safe was changed?

A. Yes, sir, the combination was changed. I don't know just when.

Q. Was it prior to the robbery or afterwards?

A. Afterwards.

Q. Afterwards. Wasn't changed before?

A. No, sir.

Mr. ROTH.—We object to that, if the Court please, upon the ground the same is irrelevant, incompetent and immaterial, and a proper foundation has not been laid for the introduction of the testimony in that it does not yet appear that that is the safe that was provided by the Government. It does not yet appear that is not a safe that was provided by Mr. Deal himself personally, and if it were a safe provided by Mr. Deal personally that he would not be bound by the regulations of the department with reference to that safe, unless it was a safe that was furnished by the Government.

The COURT.—Objection overruled.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

Q. Miss Smith, prior to going to work for Mr. Deal were you familiar with the work in the postoffice?

(Testimony of Lillian G. Smith.)

A. Well, no. I worked in the Livengood post-office for just a short time, a few months.

Q. I will ask you, when did you go to work the last time in the postoffice at Fairbanks, Alaska?

A. The last time? [67—38]

Q. Yes. A. August 15, 1921.

Q. And from the 15th of August to the 15th of September, did anyone instruct you as to how to carry on your work, or were you familiar with it?

A. Well, I wasn't familiar with the dispatching. Mr. E. A. Herring came in and helped me several times.

Q. On how many occasions, do you know?

A. Well, might have been twice. And then the latter part of the month I had to make up a statement for the "News-Miner" and I didn't know anything about that, and he came in and showed me how to do that.

Q. That was the extent of it, was it?

A. I think so. Then along in December, December 28, 1922, I think it was, I was in the hospital for about ten days, and Mr. Herring took my place then.

Q. I don't care about that. Miss Smith, explain what you mean by the day combination to the safe?

A. Well, if the knob of the safe was turned more than three or four points it turned off onto another combination which I couldn't use, and all I knew was just these three points.

Q. Who instructed you as to the use of that?

(Testimony of Lillian G. Smith.)

A. Mr. Deal.

Q. State whether or not you were under bond in the postoffice? A. Not until—

Q. (Interrupting.) Well, I will change the form of that question. Were you under bond during your employment for Mr. Deal prior to the 15th of September, 1921? A. No, sir. [68—39]

Mr. CRANE.—You may inquire.

Cross-examination.

(By Mr. CLARK.)

Q. Miss Smith, you were regularly sworn as a postoffice employee, were you not, when you went to work?

A. I think so. I really don't remember.

Q. You took—after you were employed in there did you not take the oath of office, that is, such as the postoffice employees all take?

A. I don't remember.

Q. Would you say that you were not?

A. No. No, because I have seen others come in and take the oath, so I think I must have.

Q. You think it is quite probable that you did have it administered? A. Yes, sir.

Q. Now when this package that we are referring to same in, Miss Smith,—no, before I go on with that I want to ask you another question. You say you went to work for Mr. Deal the last time the 15th of August, 1921? A. Yes, sir.

Q. Had you been working in the postoffice before that? A. Yes, sir.

(Testimony of Lillian G. Smith.)

Q. How long before that?

A. April 7, 1919, to November 15, 1920.

Q. Then from November, 1920, until August, 1921, you were not in the postoffice?

A. No, sir. But I did go down during that time and help Mr. Deal.

Q. Now you do not know, Miss Smith, do you, whether or not [69—40] Mr. Deal changed the combination of any safes during the time you were not working there? A. No, I don't know.

Q. You know, do you not, that even though the combination had been changed that that wouldn't affect the day combination?

A. No, I don't think it would.

Q. Mr. Deal may have changed the combination of the safe half a dozen times, might he not, without you knowing it? A. Yes, sir.

Q. Now when this package came in, this package in controversy, Miss Smith, you state that when you put it in that paper container that it was a very tight fit and that it tore the container at the corner? A. Yes, sir.

Q. Did you observe anything peculiar, any circumstance in connection with the wrapping of that package that night, any torn piece of paper sticking up, anything of that kind?

A. I just noticed the next morning, I noticed the torn corner when I put it in the pouch.

Q. Did you notice it the night before?

A. No, sir. Well, I did notice it when I put it in the container.

(Testimony of Lillian G. Smith.)

Q. That is what I mean. A. Yes, sir.

Q. Did you notice it when you put it in the container that it tore the corner of the pouch?

A. Yes, I did.

Q. And you then wrapped twine around it several times? [70—41] A. Yes.

Q. And was there a little corner or little piece of paper sticking up when you wrapped the paper up showing where it had been torn?

A. Just that one little torn place.

Q. Just that one little torn place at the corner?

A. Yes.

Q. Now when you threw that package into the safe I understand you stooped down and threw it into the compartment? A. Yes, sir.

Q. And did I understand you to say that in throwing it in that one corner went up—

A. (Interrupting.) The light went off and the heavy end went up against the wall of the safe.

Q. The heavy end went up against the wall of the safe? A. Yes, sir.

Q. And was one corner turned up against the—

A. (Interrupting.) No, it was lying flat, just lying flat, and one corner up against the wall, one end of it.

Q. One end was against the wall? A. Yes, sir.

Q. Now when you opened that safe the next morning and took out that package what was its condition as regards its position in this safe?

A. Well, it looked just exactly the same as it did the night before.

(Testimony of Lillian G. Smith.)

Q. When you took it out and in your hands and examined it the next morning what was the condition as regards the wrappings and the torn place in the jacket?

A. Well, the twine was just the same and the corner was torn just the same. [71—42]

Q. Could you see any difference whatever in the condition of that package when you took it out the next morning from what it was when you put it in there the night before?

A. Well, when I put it in there the night before I picked it up with both hands, I kind of squeezed it, and it filled my hands just nicely, and the next morning it was just the same.

Q. The next morning—

A. (Interrupting.) I just put both hands around it like that (illustrating), and of course I wasn't suspecting anything.

Q. Was there any indication, anything in connection with that package that indicated in any way that it had been tampered with between the time you put it in and the time you took it out?

A. Well, I didn't have it in my hands long enough and didn't open the container.

Q. Well, was there anything suspicious about the looks of it in any way? A. No.

Q. Did the twine appear to be the same as it was the night before?

A. Well, I didn't examine it—I just examined it and carried it to the pouch and threw it in.

(Testimony of Lillian G. Smith.)

Q. Now the sack that it was put in was an ordinary iron lock pouch, was it? A. Yes, sir.

Q. Such as has been in use in Alaska during all the times you have been—

Mr. CRANE.—(Interrupting.) You can take the sack, [72—43] if you desire, Miss Smith.

Q. (Continuing.) This is the character of sack that was in use at that time, was it, Miss Smith (handing sack to witness)? A. Yes, sir.

Q. You are thoroughly familiar with those?

A. Yes, sir, the iron lock.

Q. That is what is called an iron locked sack, is it not? A. Yes, sir.

Q. That distinguishes it from the brass locked sack? A. Yes, sir.

Q. And the rotary locked sack? A. Yes, sir.

Q. Now a person who has a key to that iron lock can unlock any of those iron locks in connection with the postoffice, the sacks that you use in the postoffice, can they not?

A. Yes, that particular kind of lock. We have two kind of iron locks.

Q. But this particular kind of lock, the same key will open any of them? A. Yes, sir.

Q. And, so far as you know, during all the time you have been working around the postoffice in Alaska is it not a fact that particular kind of lock has been in use? A. Yes, sir.

Q. And when you send out mail you lock it up, and when it reaches its destination they take a

(Testimony of Lillian G. Smith.)

key similar to the one you have, presumably, and open it up? A. Yes, sir.

Q. Now was that package handled any differently that [73—44] morning from any other packages that you have been accustomed to shipping? A. No, sir.

Mr. CRANE.—Object to that as improper cross-examination.

The COURT.—It has already been answered.

Q. You wouldn't know, of course, from looking at this whether this was the mail sack that went out that morning or not?

A. No, sir. They are all very much alike.

Q. When these sacks go out you stamp them, stamp the date on the slip of paper that goes in the address here (indicating)?

A. Yes. And we put the weight on it also at that time. Twelve pounds.

Q. Is that in your handwriting (indicating)?

A. No, that isn't, but this down here is, 12 pounds.

Q. Was that the sum total of all the weight?

A. That is just what was in that one sack.

Q. That is what I mean, all the weight that was in the sack? A. Yes, sir.

Q. Now, who else was in the postoffice the morning that that mail was sent out besides yourself and Mr. Deal?

A. Well, there was Mr. Deal, Mr. Lillico, Mr. Wetzler, Mr. Jim Fairborn and Mr. Eli Seko.

Q. Who is Eli Seko? What was he doing there?

A. He was helping carry the mail out.

(Testimony of Lillian G. Smith.)

Q. Mr. Fairborn who used to be connected with the Yukon Transportation Company? A. Yes, sir.

Q. Mr. Fairborn was acting temporarily as purser, was he [74—45] not, on one of the boats?

A. Yes, sir.

Mr. CRANE.—I object to that as immaterial and not proper cross-examination.

Mr. CLARK.—Well, if the Court please, he asked them who was there in the postoffice the morning that mail went out.

Mr. CRANE.—No, I asked who was there when it was taken to the postoffice.

The COURT.—Overruled.

Q. Mr. Fairborn was acting as purser on one of the boats? A. Yes, sir.

Q. And he was taking charge of the mail for down river? A. Yes, sir.

Q. What was Mr. Seko doing?

A. I believe he was working at the dock at the time helping Mr. Fairborn, but I am not sure.

Q. And Mr. Fairborn as purser on the boat, he took charge of all mail that went on to the river boats and went further than Nenana?

A. Yes, sir.

Mr. CRANE.—I object to that, if the Court please, as the witness is not competent to testify as to who took charge of it after it left here.

The COURT.—Objection sustained.

Q. Do you know whether Mr. Fairborn or Mr. Seko had keys to iron locks of this character?

Mr. CRANE.—I object to that, if the Court

(Testimony of Lillian G. Smith.)

please, as not proper cross-examination. This witness is not qualified to testify who had keys to that lock. [75—46]

The COURT.—Overruled.

Q. If you know, Miss Smith. Do you know, Miss Smith? A. No, sir.

Q. Did you see the sack actually put on the truck or on the dray that morning to go over to the railroad depot?

A. No, sir. I saw it leave the door, though.

Q. Who had it in charge, or who went out with it?

A. Well, Mr. Deal was the last one. He carried it over to the door.

Q. And did you see who took charge of it there?

A. No, sir.

Q. And did you see the express wagon when it drove away from the postoffice towards the depot?

A. Yes, I believe I did.

Q. Did you notice who all was on the express wagon?

A. Well, some of the men were riding, but I don't remember who they were.

Q. There were others on the wagon besides Mr. Lillico? A. Yes, sir.

Q. Now Mr. Wetzler is a Postoffice Inspector, is he not? A. Yes, sir.

Q. Was he there at the time the mail sack was closed?

A. No, he came in just after it was closed.

Q. He had been in and out of the postoffice during

(Testimony of Lillian G. Smith.)

the time you had been employed there at various times? A. Yes, sir.

Q. You say you saw the sack, that canvas sack, again on the 16th—oh, that was the last time you saw it was the 16th of September, was it?

A. I didn't see the canvas sack then, just the jacket.

Q. Just the jacket. [76—47]

A. You mean the small one or the large one?

Q. I mean the package you put in the safe?

A. The last time I saw it was the night of the 15th.

Q. That is when you put it into the container?

A. That is when I put it into the container, yes, sir.

Q. Now, had you ever seen the container or the sack itself since that time up until it has been introduced here in evidence? A. No, sir.

Q. So you know nothing about the condition in which it was when it arrived at Nenana or anything of that kind? A. No, sir.

Q. In that safe where you put the package that night, Miss Smith, was it a central compartment in the safe where you stored the package when you put it in at night? Was there an open compartment all the way up through the safe?

A. Yes, sir.

Q. And was it wide enough at the bottom that the package could be thrown down and it would lie flat? A. Yes, sir.

Q. Just explain just the position that that pack-

(Testimony of Lillian G. Smith.)

age was when you threw it into the safe, just how it lay. Was one end of it heavier than the other?

A. Yes, sir.

Q. Let us illustrate here. After that was put in what would be the condition of the bundle; would it be flat like that (illustrating)?

A. Well, that was the mouth of the sack, the torn end, and I took hold of it this way (illustrating) and threw it in, and in so doing it just fell out like that. [77—48]

Q. Fell out like that—

A. (Interrupting.) This end (indicating) was up against the wall of the safe just about like that.

Q. This one corner, the heavy end, was up against the edge of the wall?

A. Yes, sir, the wall of the safe.

Q. And this neck end of the sack—

A. (Interrupting.) Wasn't quite that much; about that much (indicating).

Q. Yes, but this particular corner (indicating) was up against the partition in the safe?

A. Yes, sir, the small safe.

Q. Now, when you reached in there to get it the next morning was that particular corner in the same position it was the night before?

A. I didn't notice the corner; I just noticed the edge touching that way and it looked to be the same.

Q. As far as you could see it looked to be lying in the same condition as when you put it in there the night before? A. Yes.

(Testimony of Lillian G. Smith.)

Q. After that package was put in here was it rolled like that (illustrating) or be flat.

A. Perfectly flat.

Q. That sack, whatever the contents of the sack might be, it was enough to make it extremely full?

A. Yes, sir, fit real close. I had a hard time getting it into the container.

Q. Was this container torn that much?

A. No, I don't think it was torn quite that much. It was torn just a little bit. [78—49]

Q. Then when you put it in it was torn just a little bit here at the corner (indicating)?

A. Yes, just about that much (indicating).

Q. And now it is torn this much more (indicating)?

A. Well, it might have been down here (indicating).

Q. But you think it is torn more now than when you had it? A. Yes, I do.

Q. And when you wrapped it up you put it in there, and then put the string around several times, and you noticed that this corner was torn?

A. Yes, sir.

Q. Was it torn here in the middle when you had it that night?

A. No, I don't think so. I didn't notice but the one tear over in the corner.

Q. And you did that in slipping it in?

A. Yes, sir.

Q. And this tear wasn't there (indicating)?

A. I don't think so.

(Testimony of Lillian G. Smith.)

Q. That is, the central tear along the central part of the jacket a little closer to the right-hand end, that wasn't there? A. I don't think so.

Q. You think that the main tear here is considerably—some longer?

A. Well, a little longer.

Q. It is some longer? A. Just a very little.

Q. I call your attention to the lower right-hand corner, Miss Smith, where it is torn. Was that that way when you had it? [79—50] A. No, sir.

Q. It was a new container when you picked that sack of money up, or, as they say, it was money, picked that sack up and put it in—

A. (Interrupting.) It was all intact except that one corner.

Q. And now it appears that the lower right-hand corner is torn, the central part of the main flap is torn, and to the best of your recollection this tear at the end is a little bit longer than when you saw it?

A. Yes, sir. Well, it would be impossible to get the package out without tearing it, it was so tight.

Q. But would it necessarily tear this lower right-hand corner to take it out?

A. In handling the mail it tears it up pretty badly sometimes.

Q. But when you put it in that morning it wasn't torn that way? A. No.

Q. This jacket that I have been referring to and concerning which you have just testified is marked

(Testimony of Lillian G. Smith.)

Plaintiff's Exhibit "C." This is the same one you are referring to? A. Yes, sir.

Q. In whose handwriting is that, "Nenana, Alaska, bill inside"? A. That is my writing.

Q. And the bill for these particular registered articles was put inside? A. Yes, sir.

Mr. CLARK.—That's all. [80—51]

Redirect Examination.

(By Mr. CRANE.)

Q. Miss Smith, that safe that you referred to in your testimony, is that where you ordinarily keep registered mail matter? A. Yes, sir.

Q. During the time that you were there you kept it in that place, did you? A. Yes, sir.

Q. And what, if anything, else was kept in that safe?

A. At that time kept the stamp stock.

Q. The what? A. The stamp stock.

Q. You mean postage stamps? A. Yes, sir.

Mr. CRANE.—That's all.

(Witness excused.)

TESTIMONY OF FRANK WOOD, FOR PLAINTIFF.

FRANK WOOD, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. Mr. Wood, where are you employed?

(Testimony of Frank Wood.)

A. First National Bank.

Q. You have access to the records of the First National Bank? [81—52] A. Yes, sir.

Q. I will ask you if you have registry receipt No. 1045 with you there?

A. Yes, sir. (Witness producing paper.)

Q. Where did you get it just now?

A. Got it from the records of the bank.

Q. And has that registry receipt been in the custody of the bank up to this time?

A. To the best of my knowledge it has, yes, sir.

Q. May I have it? (Paper handed to counsel.)

Mr. CRANE.—I wish to offer this in evidence as Plaintiff's Exhibit "D."

Mr. CLARK.—No objection.

The COURT.—It may be admitted.

Registry receipt referred to received in evidence, marked Plaintiff's Exhibit "D" and made a part of the record herein.)

Mr. CRANE.—No cross-examination.

(Witness excused.)

TESTIMONY OF LARRY LILLICO, FOR PLAINTIFF.

LARRY LILLICO, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Mr. CRANE.—That is all.

Mr. CLARK.—No cross-examination.

Q. What is your name? A. Larry Lillico.

(Testimony of Larry Lillico.)

Q. Where do you reside? [82—53]

A. Fairbanks, Alaska.

Q. What is your occupation. A. Expressman.

Q. What was it on September 15, 1921?

A. Expressman.

Q. Mr. Lillico, on September 16, 1921, did you take the mail from the postoffice at Fairbanks, Alaska, to the train at Fairbanks, Alaska?

A. I did.

Q. Where did you receive the mail that day?

A. At the postoffice.

Q. And where and to whom did you deliver it?

A. To Mr. Keller at the Tanana Valley warehouse.

Q. You remember of receiving from Postmaster Deal at the postoffice the sack of mail billed to Nenana, Alaska? A. Well, I can't remember.

Q. You don't remember the bill?

A. No.

Q. I will ask you if you received a sack similar to this one on that day (exhibiting sack to witness)?

A. Well, that I can't say, but we have sacks going out like that right along.

Q. I will ask you if all the sacks—state whether or not all the sacks you received that day were locked or closed when you received them?

A. Well, there may have been some ties, too, that went out.

Q. That is what I say, locked or tied?

A. Yes, sir.

Q. Pouches? A. Pouches.

(Testimony of Larry Lillico.)

Q. Did all the pouches have locks on them that day? [83—54] A. Yes, sir.

Q. Did you turn them over to Mr. Keller at the depot in the same condition that you received them from Postmaster Deal? A. Yes, sir.

Q. How long did it take you, approximately, to deliver it from the postoffice at Fairbanks, Alaska, to the depot?

A. I had my autotruck. Only be a couple of minutes going over, I guess, something like that.

Q. Were they out of your sight or out of your custody at any time between the postoffice and the time you delivered them to Mr. Keller?

A. They were on the rig all the time.

Q. You were there? A. Yes, sir.

Mr. CRANE.—That's all.

Cross-examination.

(By Mr. CLARK.)

Q. Who went over with you, Mr. Lillico, on the truck? A. Mr. Fairborn.

Mr. CRANE.—One other question. Did anyone else handle the sacks while they were on your truck and under your care?

A. Why, I don't think so.

Mr. CRANE.—You were there all the time and would know if it had been? A. Yes, sure.

Q. Who went over on the truck with you?

A. Mr. Fairborn and Mr. Seko. [84—55]

Q. How did it happen Mr. Fairborn and Mr. Seko were with you?

(Testimony of Larry Lillico.)

A. Why, we picked up the express at the express office of the White Pass and then came around and got the mail.

The COURT.—Mr. Fairborn was express agent, was he?

A. Yes, he was going down with the lower river mail.

The COURT.—Is this man Seko a helper of his?

A. Yes, he is working for the White Pass. He rode on the back of the rig and Fairborn rode on the seat with me.

Q. Seko rode on the back of the rig?

A. Yes, sir.

Q. And Mr. Fairborn was also acting as purser on the down river boats at that time?

A. Yes, sir.

Q. And he picked up at the postoffice some mail to go down river, didn't he?

A. Yes, there was lower river mail with this other, yes, sir.

Q. Now at that time when you took the mail over there the condition was entirely different from what it is now? A. Yes, sir.

Q. So far as buildings are concerned?

A. Yes, sure.

Q. Where did you take that mail when you got over there, Mr. Lillico?

A. I took it to the No. 1 door, I think, of the warehouse. I think it is No. 1, or No. 2.

Q. Which side of the warehouse would that be, the east or west? [85—56]

(Testimony of Larry Lillico.)

A. That would be the west.

Q. The railroad track where it was, or you were, is on the east side of the depot? A. Yes, sir.

Q. So you went around on the west side of the warehouse and unloaded the mail into the warehouse, did you? A. Yes, sir.

Q. Did you unload anything else there?

A. Unloaded the express.

Q. Unloaded the express and mail together?

A. Yes, sir.

Q. Right into the warehouse?

A. Yes, right into the door of the warehouse.

Q. Who was there to receive it, if anybody?

A. Mr. Keller was there.

Q. Did you hand him the mail or did you just pile it in there?

A. Just as I always do, just put it in the door, and he was there and Mr. Seko was there tending to the express.

Q. Now how long was that before the train left?

A. I couldn't say.

Q. You never saw it when it was transferred into the train, did you? A. No, sir.

Mr. CRANE.—Object to that, if the Court please, as not proper cross-examination. We didn't go into that. He only testified he delivered it to Mr. Keller. Beyond that counsel has no right to inquire.

The COURT.—Objection sustained.

Mr. CLARK.—Very well, I withdraw it. [86—57]

(Testimony of Larry Lillico.)

Q. How large a building is that depot, Mr. Lillico, that old one, that old warehouse? How far would it be through from east to west?

A. Oh, I don't know exactly how far it is.

Q. About sixty feet, isn't it?

A. Between fifty and sixty feet, yes.

Q. About what time in the day was it that you took the mail over, or do you recall?

A. I think that train used to leave at 8:00, or 8:30 or 9:00. They were changing there. I don't know just now.

Q. You don't remember what hour it was you took it over?

A. No. It would be just very shortly before the train left, whatever time it left.

Q. You could not say of your own knowledge whether it was fifteen minutes or forty-five minutes before the train left?

A. We always made it a point to leave there about fifteen or twenty minutes before the train left.

Q. For a number of years you have been engaged in transporting mail back and forth, haven't you, between the railroad and the postoffice?

A. About eleven or twelve years, yes, sir.

Q. And you are accustomed to delivering the mail where the postoffice officials tell you or where the people across the river tell you? A. Yes, sir.

Q. And after you once get it over there and deliver it to Mr. Keller you pay no attention?

A. No, sir.

(Testimony of Larry Lillico.)

Q. Did you call his attention to this mail that you put down there? [87—58] A. No.

Q. Or did you just dump it in the door?

A. Just did as I would any other time.

Q. Mr. Keller was busy with the express, too, was he not?

A. I don't know whether he had anything to do with the express or not.

Q. This was getting along towards the end of the season—

Mr. CRANE.—(Interrupting.) Object to that as incompetent, irrelevant and immaterial.

Mr. CLARK.—All right, I withdraw that.

Q. And you don't know whether they were locked sacks or tied sacks or what they were that you took over, do you? A. No, I can't remember now.

Q. All that you know is that the tops of them were closed, whatever they were?

A. Yes, sir.

Mr. CLARK.—That's all.

Redirect Examination.

(By Mr. CRANE.)

Q. Who is this Mr. Fairborn they speak of that rode over with you?

A. He is an agent for the White Pass.

Q. Not a mail messenger, is he?

A. I don't know, I am sure. He was agent of the White Pass.

Q. That is a steamboat company, is it?

A. Yes.

(Testimony of Larry Lillico.)

Q. Where did he ride with you?

A. Rode on the seat with me.

Q. In the seat with you?

A. Yes, sir. [88—59]

Mr. CLARK.—Mr. Fairborn was acting as purser that late in the season, wasn't he, Mr. Lillico?

A. He was going down as purser on one of the lower river boats, I understand, taking the mail down with him.

Q. Well, he didn't get in any of these mail sacks while you had them, did he?

A. No. Pretty hard. You can't get over the seat.

Mr. CRANE.—That's all.

(Witness excused.)

TESTIMONY OF A. H. KELLER, FOR PLAINTIFF.

A. H. KELLER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. State your name. A. A. H. Keller.

Q. Where do you reside, Mr. Keller?

A. At the present time in Seattle is my home.

Q. Where were you residing on September 15, 1921, Mr. Keller?

A. Garden Island, Fairbanks.

Q. And what was your occupation at that time?

(Testimony of A. H. Keller.)

A. Freight clerk for the Alaska Engineering Commission.

Q. Were you freight clerk of the Alaska Engineering Commission on the 16th of September, 1921? A. I was. [89—60]

Q. I will ask you if on that date you received the mail going—received the pouch of mail going from Fairbanks to Nenana on that date from Mr. Lillico? A. I did receive them, yes, sir.

Q. And I will ask you if you received a sack similar to this one I have in my hand?

A. I think that—it was a sack similar to that, I thought was wrapped up that way; my impression it was; looked to be this way.

Q. It was closed at the time you received it?

A. Yes, sir.

Q. Who did you receive that sack from?

A. Larry Lillico.

Q. And what did you do with it?

A. Handed them to Mr. Nordby in the freight car. He handed one to him and I think I threw the other to him. I think there was only two or three sacks; the mail was very light.

Q. Were they locked at the time you handed them to Mr. Nordby?

A. I think they were. They looked like first-class mail.

Q. The time you gave the sack to this Mr. Nordby was it in the same condition as you received it from Mr. Lillico? A. It was.

(Testimony of A. H. Keller.)

Q. Was it under your care and custody from the time you received it from Mr. Lillico until you loaded it on the car and gave it to Mr. Nordby?

A. Yes, sir.

Q. Did anybody else handle it or bother with it while it was under your car

A. No, sir. No one touched it from the time it left my [90—61] hands and went into the car, and Mr. Nordby was the only one present in the car.

Q. What kind of a car was that you loaded it in?

A. A freight-car, box freight-car.

Q. About how long was it in your custody from the time you received it from Mr. Lillico until you loaded it on the car, gave it to Mr. Nordby?

A. Might have been possibly two minutes, but I don't think it was over one minute. Possibly wasn't over two minutes.

Mr. CRANE.—You may cross-examine.

Cross-examination.

(By Mr. ROTH.)

Q. Mr. Keller, I understood you to say that you were freight clerk? A. Yes, sir.

Q. As such did you understand that you were authorized to handle mail?

Mr. CRANE.—Object to that as incompetent, irrelevant and immaterial, and not proper cross-examination. Further, it doesn't tend to prove or disprove any of the issues in this case, and not proper cross-examination.

(Testimony of A. H. Keller.)

The COURT.—Objection sustained.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

Q. Were you a sworn officer at that time?

Mr. CRANE.—Same objection, if the Court please.

The COURT.—Same ruling.

Mr. ROTH.—We except. [91—62]

The COURT.—Exception allowed.

Q. How many sacks did you receive at that time, Mr. Keller, mail sacks, I mean?

A. I am not sure as to that, but I think there was two sacks; might have been three. That is, I think it was. There was a very light mail that morning; lighter than usual.

Q. You say that you delivered this mail to Mr. Nordby? A. Yes, sir.

Q. Why did you deliver it to Mr. Nordby?

Mr. CRANE.—Object to that as improper cross-examination, why. The witness stated he did deliver it to Mr. Nordby.

The COURT.—Overruled. He may answer.

A. The brakeman and conductor always handle the—receive the mail in the freight-car, and they handle it and I delivered it to him.

Q. What position did he occupy.

A. Brakeman.

Q. Oh, he was a brakeman? A. Yes, sir.

Q. How long was that before the train left that you delivered that to Mr. Nordby in a box-car?

(Testimony of A. H. Keller.)

A. It might have been about an hour, something around about an hour.

Q. And did the box-car stand right there during that hour? A. No, sir.

Q. Where did it go?

A. Switched to the other side for the passenger-car. Well, I don't know about that, but I know they did switch away from there. [92—63]

Q. How long after the mail sack was delivered by you to Mr. Nordby was the car taken away from there?

A. Well, I think it might have been one or two minutes. Not longer than one or two minutes.

A. The engine took that car away within one or two minutes?

A. I am quite sure as to that, yes, sir.

Q. Now what makes you so sure as to that, Mr. Keller?

Mr. CRANE.—I object to that as not proper cross-examination, if the Court please. This witness only went into delivering the sack to the brakeman Nordby, and as to anything about the train pulling out would be incompetent, irrelevant, and immaterial and not proper cross-examination.

The COURT.—Overruled.

A. Just about the time we finished loading—Mr. Rodebaugh, the conductor, and Mr. Nordby and myself loaded the freight, and about five minutes before we finished loading I heard Mr. Rodebaugh say, "I will go for the engine," and I was just putting the last piece of merchandise in the car

(Testimony of A. H. Keller.)

and Nordby spoke to me and says, "Is that all?" and just that very instant Lillico drove up, and I says, "Well, what have you got there, Lillico?"—no, Nordby says, "Is that all?" I says, "No, here is the mail." I had a hold of the end of the truck, drove right up, and Lillico put the two down and I took them right across the door. I received them at door 1 on the west side, took them across about sixty feet, and had to hurry because the engine was backing up then, and gave them, I think one to Nordby and the other I threw into the car, and Nordby says, [93—64] "Is that all?" and I says "Yes," and I drew the box-car door to and hooked it up, and at that very instant the train was backing up, and we had to be very cautious to get everything in the car. And it backed right up and went to the other side.

Q. Who was with Mr. Lillico at that time, if you remember?

A. It seems to me that Eli Seko was with him and was sitting on the back of the wagon, but I couldn't say as to that, though.

Q. Anybody else? A. No, I think not.

Q. Did you know at that time a man by the name of Jim Fairborn? A. The transportation man?

Q. Yes. A. Yes, sir; I know him well.

Q. Was he there?

A. I don't think so. No, there was nobody on the seat with Lillico, I don't think. Mr. Fairborn wasn't there, though. He didn't drive up to the door. He jumped off before he got—excuse me,

(Testimony of A. H. Keller.)

but I think he jumped off before he got there. He wasn't with Lillico, I am quite sure about that.

Q. Did I understand you to say that you pulled the door of the car shut? A. I did.

Q. Did you lock it?

A. Put a hook on it, a hook, not a lock, a hook to hold the door in place after it goes through the iron.

Q. So that any person could open it?

A. Yes, sir. [94—65]

Q. Did anybody remain in that car?

Mr. CRANE.—Object to that as not proper cross-examination.

The COURT.—You are supposed to testify as to your own knowledge, Mr. Keller. Overruled. You can answer that question, if you know.

A. I don't know.

Mr. CRANE.—Exception.

The COURT.—Exception allowed.

Q. You don't know. Did you have a conversation with Mr. Deal about the occurrence that took place there on that morning? Did you have a conversation with him the next day after that?

Mr. CRANE.—Just a minute, Mr. Keller. Object to that as incompetent, irrelevant and immaterial, and it is improper cross-examination. If they want to make their witness out of this witness it is all right, but I didn't go into that on direct examination. I object to it as improper cross-examination.

(Testimony of A. H. Keller.)

The COURT.—It will be overruled. I presume it is preliminary.

Mr. CRANE.—Exception, please.

Q. (Question read.)

A. I don't think I did. I had no conversation with Mr. Deal as I can recollect in regard to the occurrence.

Q. When the car was taken away from there where was it taken to immediately, if you know?

Mr. CRANE.—Object to that as improper cross-examination, and further objected to as repetition.

The COURT.—Overruled. He may answer if he knows. [95—66]

Mr. CRANE.—Exception.

The COURT.—Exception allowed.

A. No, I wouldn't know particularly where it went to. No, sir, I couldn't say that. The engine was there and—

Mr. ROTH.—(Interrupting.) That's all.

(Witness excused.)

TESTIMONY OF G. B. ERWIN, FOR PLAINTIFF.

G. B. ERWIN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. State your name, please. A. G. B. Erwin.

Q. Your occupation? A. Attorney at law.

(Testimony of G. B. Erwin.)

Q. You were formerly United States Attorney, were you, Mr. Erwin? A. I was.

Q. I will ask you, Mr. Erwin, if you were present with Mr. Bruner, Postoffice Inspector Bruner, when he made a demand on the defendant T. H. Deal for the sum of nine thousand nine hundred dollars alleged to be lost while in the postoffice at Fairbanks, Alaska? A. Yes, sir.

Q. He made such a demand, did he?

A. Yes, sir. [96—67]

Q. I will ask you if later you, as United States Attorney, wrote a letter to Mr. T. H. Deal making demand upon T. H. Deal for nine thousand nine hundred dollars stolen from the Fairbanks postoffice on the night of September 15, 1921?

A. I did.

Mr. CLARK.—To which we object because that is admitted by the answer of Mr. Deal that a demand was made, that he refused to pay, and still refuses to pay it.

The COURT.—He has already answered that he did.

Mr. CRANE.—I just wanted it in the record.

Mr. CLARK.—What is the necessity of encumbering the record.

Mr. ROTH.—Read the last question and answer, please. (Last question and answer read). Do you mean by your answer to say that nine thousand nine hundred dollars was stolen from the Fairbanks postoffice? A. No, no.

(Testimony of G. B. Erwin.)

Q. All right, Mr. Erwin, I will ask you if this is a true copy of the letter that you wrote to Mr. Deal (handing paper to witness).

Mr. ROTH.—We object to that, if the Court please, on the ground the same is irrelevant, incompetent and immaterial; that it is admitted by the pleadings in the case that a demand was made for the return of nine thousand nine hundred dollars upon Mr. Deal and that Mr. Deal refused, and still refuses, to return it, or to give it or pay it to the Government of the United States. [97—68]

Mr. CRANE.—Very well.

Mr. ROTH.—Counsel put a ringer in his question.

Mr. CRANE.—Counsel says I put a ringer in my question. I will show you the letter.

Mr. ROTH.—If there was a ringer in the letter you had no business to try to put it before the jury.

Mr. CRANE.—I will put the letter itself before Mr. Roth in a minute.

Mr. ROTH.—We object to that letter as incompetent, irrelevant and immaterial.

Mr. CRANE.—It hasn't been offered yet.

Q. Is that the letter, Mr. Erwin (handing paper to witness)? A. Yes, sir.

Q. And this is the letter you refer to where you made demand upon Mr. Deal? A. Yes, sir.

Mr. CRANE.—I offer this as an identification.

Mr. CLARK.—To which we object, if the Court please, as incompetent, irrelevant and immaterial,

and trying to get in a self-serving declaration in the guise of a letter.

Mr. ROTH.—And that is admitted by the pleadings that a demand was made and refused. They claim they only wanted him for one purpose, and this is the demand, but it is made for avery different purpose.

Mr. CRANE.—I would like to say, if the Court please, I had no intention of putting the letter in originally, but when counsel raised the question I was trying to get a ringer in [98—69] my question I want to show I was only asking the question from the letter as the demand was made and putting in the demand as the demand was made upon the defendant.

The COURT.—The objection will be sustained.

Mr. CRANE.—Exception, please.

The COURT.—Exception allowed.

Mr. CRANE.—That's all.

(Witness excused.)

Whereupon an adjournment was taken until Tuesday, February 17, 1925, at 10:00 o'clock A. M. [99—70]

MORNING SESSION.

Tuesday, February 17, 1925, 10:00 A. M.

TESTIMONY OF E. H. MACK, FOR PLAINTIFF.

E. H. MACK, called as a witness on behalf of the plaintiff, being first duly sworn,testified as follows:

(Testimony of E. H. Mack.)

Direct Examination.

(By Mr. CRANE.)

Q. You reside in Fairbanks, do you, Mr. Mack?

A. Yes, sir.

Q. Your name is E. H. Mack? A. Yes, sir.

Q. Mr. Mack, were you at one time employed in the postoffice at Fairbanks while Mr. Deal was postmaster? A. I was.

Q. Just give us about what dates and how long you were employed there?

A. I forgot now whether it was—I think it was the fall of '17 and the spring of '18, if I am not mistaken.

Q. I will ask you if you remember an incident of Mr. Deal calling you over and asking you to change the combination on the small sa*g*e in the postoffice?

A. Yes, sir.

Q. Was that prior to the robbery of September 21, 1921, or after the robbery?

A. It was after the robbery.

Q. While you were employed in the postoffice do you remember whether the combination to the small safe was changed or not? [100—71]

Mr. CLARK.—We object, if the Court please, as incompetent, irrelevant and immaterial, and no foundation has been laid for it; it has not been shown there was any loss occasioned by reason of any failure to change any combination, or that the combination was required to be changed on the safe in which registered mail was kept.

(Testimony of E. H. Mack.)

Mr. ROTH.—I want to add to that. And on the further ground that there is no act of negligence pleaded in the complaint by which this testimony could possibly be competent.

The COURT.—Overruled.

Mr. CLARK.—Exception.

The COURT.—Exception allowed.

A. I don't recollect at the present time.

Q. Mr. Mack, while you were employed in the postoffice at Fairbanks, Alaska, state whether or not you were under bond, whether you were under bond as a postoffice employee?

A. I don't remember whether I was or not. I might have been, but I am not certain right now.

Mr. CRANE.—You may inquire.

Mr. CLARK.—No questions.

(Witness excused.) [101—72]

TESTIMONY OF WHITNEY W. CLARKE, FOR PLAINTIFF.

WHITNEY W. CLARKE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. What is your name, please?

A. Whitney W. Clarke.

Q. And your residence?

A. Fairbanks, Alaska.

(Testimony of Whitney W. Clarke.)

Q. Mr. Clarke, were you formerly employed in the postoffice at Fairbanks, Alaska?

A. I was, yes.

Q. Were you employed there while Mr. T. H. Deal was postmaster? A. I was.

Q. And what was your position at that time?

A. Assistant Postmaster.

Q. Were you employed there in 1921?

A. Yes.

Q. Were you there on the 15th of September?

A. Yes.

Q. Were you employed in the postoffice on the 15th of September when this loss occurred?

A. I was.

Q. I will ask you, Mr. Clarke, if while you were employed in the postoffice and prior to the 15th of September, 1921, if it was customary in the postoffice to use the day combination on the small safe when closing it at night?

Mr. CLARK.—To which we object, if the Court please, as incompetent, irrelevant and [102—73] immaterial. It is not alleged in the complaint as an act of negligence, and not even specifically mentioned as an act of alleged negligence; it is a variation; they are attempting to vary the terms of the complaint.

Mr. CRANE.—One of the violations I have alleged covers that point.

The COURT.—Objection overruled.

Mr. CLARK.—Exception.

(Testimony of Whitney W. Clarke.)

The COURT.—Exception allowed.

A. What was the question?

Q. (Question read.)

A. It was.

Q. Now, Mr. Clarke, as Assistant Postmaster did you have both the day combination and the full combination to the small iron safe?

A. I did.

Q. I will ask you if while you were employed in the Post Office and prior to the robbery of September 15, 1921, if the combination on the small iron safe was changed to your kowledge?

Mr. CLARK.—We object as incompetent, irrelevant and immaterial, and no foundation laid, and for all the other reasons heretofore urged in connection with the last question.

The COURT.—Objection overruled.

Mr. CLARK.—Exception.

The COURT.—Exception allowed.

A. Not to my recollection.

Mr. CRANE.—You may inquire.

Mr. CLARK.—No questions.

(Witness excused.) [103—74]

TESTIMONY OF ED A. HERING, FOR PLAINTIFF.

ED A. HERING, called as a witness on behalf of the plaintiff, being first fully sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. You may state your name.

(Testimony of Ed A. Hering.)

A. Ed A. Hering.

Q. And what is your occupation, Mr. Hering?

A. At the present time I am in the express and transfer business.

Q. Mr. Hering where were you employed on the 15th of September, 1921?

A. I was engineer at the Fairbanks Laundry.

Q. And you had formerly been employed at the postoffice at Fairbanks, had you?

A. Yes, sir. I was still helping them out there evenings.

Q. Just a minute. We will get to that later. When did you leave the employment of the postoffice?

A. I am not quite sure as to the date. I think it was the 15th of August that I ceased doing the dispatch work.

Q. About a month before?

A. Yes, sir.

Q. And who took your place?

A. Miss Lillian Smith.

Q. Mr. Hering, while you were in the postoffice did you have the combination to the small iron safe, either the full combination or the day combination?

A. I did.

Q. Which one did you have?

A. The day combination. [104—75]

Q. You had the day combination only?

A. Yes, sir.

Q. In putting registers in the small safe, iron safe—I call that the small safe. A. Yes sir.

(Testimony of Ed A. Hering.)

Q. Would you lock it and unlock it on the day combination only?

A. I could only unlock it on the day combination because I didn't know the other combination. But when I received mail at night, put it away, I always throwed it on the full combination before I left, unless I was to come down in the morning alone to work at the mail. If I dispatched alone in the morning then I left it as it was.

Q. On this day combination?

A. On the day combination.

Q. Who opened the safe when it was on the full combination if you know?

A. Mr. Deal. He generally came down with me on the dispatch days when there was outside mail. On the creek mails I generally came down myself.

Q. Now, Mr. Hering, on the 15th of September, 1921, the night of the 15th of September, 1921, were you in the postoffice?

A. I was.

Q. And how did you get it there, in the workroom of the postoffice?

A. The regular work door where the employees come in and out.

Q. With the key? A. Yes, sir.

Q. And whose key did you have? [105—76]

A. Mr. Deal's key.

Q. And what time in the evening, as near as you

(Testimony of Ed A. Hering.)

can remember, and about where did you get that key from Mr. Deal?

A. About fifteen, or possibly eighteen or twenty minutes to 8:00. I met Mr. Deal in front of the First National Bank, on that corner, and received the key.

Q. Then when you went to the postoffice you entered, you say, through the regular door into the work-room? A. Yes, sir.

Q. About how long were you in the work-room that evening, as near as you can remember?

A. Well, I should judge ten or twelve minutes, in and out.

Q. And what did you do while in there, just briefly?

A. I dispatched some mail for the "News-Miner" that I was taking to the postoffice, placed it in the outgoing sacks and went to my own box, took out my mail—you want me to go into detail with the—

Q. (Interrupting.) Just—

A. (Interrupting and continuing.) —and while there I noticed a box just above mine that had some mail in, and to which I had the key, and I took that mail with my own—I knew the owner of the box, a party by the name of Mignon Mitchell, could not get the mail without it—I took her mail with mine and put it in my pocket, or laid it up on a bench till I was ready to go out, and I went outside and tried a key that I had of hers in the lock. It was my duty while in the postoffice to repair the locks, and I understood them, to repair the locks

(Testimony of Ed A. Hering.)

on the lock boxes. This key had been turned over to me because it wouldn't work for [106—77] some reason. I went outside and tried the box and saw that the key would not work. Then I went back in and stepped back to the key-rack, which is a large board hanging in the back part of the office,—

Q. (Interrupting.) Just show us about what part of the office that key-rack would be in and where the safe would be.

A. Directly back of Mr. Deal's desk, and the safe stood in front of the window, in front of that rack. I believe I would I would have to go between the two safes to get back there. I took another key—I hung this key up and took another key off the ring—there are generally three keys to each box—and stepped outside and tried that one, and I saw that the box would not work, the key wouldn't work, and I was in a hurry to get away to go up to the picture show, and I just put the key in my pocket and went on home. The last time I didn't go back into the office. I had the package in my pocket.

Q. Now after you left the postoffice where did you go to?

A. I went to my brother's candy store, which is now Mr. Whitney Clarke's store here, by appointment to meet Mrs. Hering, my brother and his wife to go to the picture show.

Q. Did you then go to the picture show?

(Testimony of Ed A. Hering.)

A. I did.

Q. Did you have the keys with you up to the time that you got to the show? A. I did.

Q. And what did you do with them there?

A. By appointment with Mr. Deal I stopped—I went and sat down and handed them to my sister-in-law, who handed [107—78] them to Mr. Deal. Mr. Deal told me on giving me the keys that he was going to the picture show. I first said when he offered to give me the keys to put the mail in, I was going to the picture show and might not see him, and he says, "That is just where I am going and you can give them to me there."

Q. Now, while you were in the postoffice was there anybody else in there or come in while you were there, in the work-room?

A. There was nobody in the work-room; no, sir.

Q. Nobody but yourself?

A. Nobody but myself.

Q. Is that the entire transaction now as you remember it, Mr. Hering, about the keys?

A. Yes, sir.

Mr. CRANE.—You may inquire.

(Recess.)

Mr. CRANE.—One other question, Mr. Hering, before you are cross-examined.

Q. I want to get this clear about that small safe. While you were in the employ of Mr. Deal there I understood you to say you kept the registers in the small safe, is that correct?

(Testimony of Ed A. Hering.)

A. Yes, sir. When I first started there was another safe there that I had the lock to entirely.

Q. I mean just since the small safe was put in?

A. Yes, sir.

Q. And what else, if anything, was kept in there, or do you know?

A. Why, there was the stamps that were on sale, the surplus stamps; and I think during the war time, if I am [108—79] not mistaken, the war stamps.

Q. You mean by the other stamps, postage stamps?

A. Postage stamps, and I think the reserve war stamps, or at least at times there were some of them in there.

Mr. CRANE.—You may inquire.

Cross-examination.

(By Mr. CLARK.)

Q. Mr. Hering, when you went into the postoffice as an employee were you sworn as a mail carrier or mail clerk? A. Yes, sir.

Q. And you severed your connection as a regular clerk about the 15th of August?

A. I think it was exactly the 15th of August, yes, sir.

Q. That was 1921? A. Yes, sir.

Q. Who took your place?

A. Miss Lillian Smith.

Q. Did you, subsequent to the time when you severed your connection as a regular clerk—

Mr. CRANE.—(Interrupting.) I didn't get the question.

(Testimony of Ed A. Hering.)

Q. Did you, subsequent to the time when you ceased to be employed there as a regular clerk, did you assist Miss Smith in her work?

A. Yes, sir.

Q. What arrangements were made, if any, at the time when Miss Smith went in to take your place about you instructing her in her work?

A. Mr. Deal asked me if I would come back and help them with the distribution of the first-class mail evenings when I could get away from my work, and if I would help [109—80] Miss Smith with the dispatch work and making out her reports. The reports from that department were a little complicated for one who didn't understand weighing in the second class, and so on, and the times the mail would go, and I came for two or three months after that and worked with her making out these reports. And I also came down and showed her about the dispatching the mail and tying the bundles, and so on. She generally done this work evenings. And at one time when she was ill I happened to be off from the laundry owing to a minor accident, and I worked about ten days, I think, eight or ten days, in her place while she was in the hospital. This was without compensation because Miss Smith had helped me at different times and I just simply came back as an extra.

Q. And you at that time had the paper circulation of the "News-Miner," did you not?

A. Yes, sir, I owned the city circulation for the "News-Miner" all the time I was in the postoffice

(Testimony of Ed A. Hering.)

and some months after I worked in the laundry; I think a year after.

Q. What did you consider your status as regards the postoffice subsequent to the time when you ceased to draw salary but prior to the time when you ceased to help Miss Smith?

Mr. CRANE.—We object to that, if the court please, as improper cross-examination, incompetent, irrelevant and immaterial, not tending to prove or disprove any issue in this case, and calling for a conclusion of the witness.

The COURT.—Objection sustained. [110—81]

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

Q. When first-class mail arrived in the evening you went in and assisted in the distribution?

A. I did.

Q. And this night in question when you went to the postoffice with the papers did you handle those papers any differently from what you had at other times?

A. No, sir, exactly the same.

Q. When you took the papers in, when you got the keys from Mr. Deal what did you do with the papers you took in?

Mr. CRANE.—Object to that as improper cross-examination and repetition.

The COURT.—Overruled.

A. Will you read the question?

Q. (Question read.)

A. I followed the usual routine. I think I first

(Testimony of Ed A. Hering.)

took them in and weighed them, that has to be done, and made a note of it, and then placed them on the sorting table and cut the string—I had my arms full, there was quite a good-sized bundle—and sorted them, what we call throwing them into the sacks, the bundles into the proper sacks and the loose papers into the proper sacks from the distributing table.

Q. Now, where were those papers going that you threw into the sack?

A. Well, some of them would be going outside and some up and down river. I don't recollect at this present time whether it was an outside mail or simply Alaskan mail that I was dispatching. It would depend upon what the outgoing mail was the next day. I know it was a [111—82] good-sized mail because it was more than my boy could carry. I took it down myself for him. One of the small boys sometimes take them down to the office.

Q. Now did you have those papers with you when you met Mr. Deal in front of the bank?

A. I did.

Q. What did you say to Mr. Deal or what did he say to you at the time you secured the key?

Mr. CRANE.—We object to this as immaterial, if the Court please, and further it woud be hearsay.

Mr. CLARK.—If the Court please, it is cross-examination. They asked about getting the keys from Mr. Deal and the circumstances and what he did. We are entitled to show all the circumstances connected with the transaction.

(Testimony of Ed A. Hering.)

The COURT.—I don't believe it would be material to show what the conversation was, Mr. Clark. The objection will be sustained.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

Q. About what time was it, Mr. Hering, when you got the keys from Mr. Deal?

A. I think about a quarter to 8:00. I would have to qualify that. If the picture show was starting at that time at 8:30 it would have been a quarter past 8:00, because I figured when I left the "News-Miner" office with the mail that I had just about time to go to the postoffice and leave them and meet Mrs. Hering to fill our appointment, and I hurried along, and, as I said, I met Mr. Deal, told him my business there, received the keys, and I hurried. I don't think it could have [112—83] been over a quarter to 8:00, or 8:15. That would be qualified by the time of the picture show. They changed the time so that I don't remember.

Q. Now after you had distributed these papers and had tried these keys in this postoffice box do you say you went down to your brother's candy shop? A. Yes, sir.

Q. And you there met the parties with whom you were going to the picture show?

A. Yes, sir.

Q. When you got to the picture show had the show started? A. No, it had not.

Q. So from the time you left, the time you got the keys from Mr. Deal until the time you went and

(Testimony of Ed A. Hearing.)

met the parties with whom you were going to the show, and reached the show about how long do you think it was?

A. I think about fifteen minutes. The orchestra, I think, started just shortly after I was seated.

Q. And did you see Mr. Deal in the picture show when you went in?

A. Yes, sir. One in this place generally takes some seats, and Mr. Deal generally sits a row or two in front of where—

Mr. CRANE.—(Interrupting.) Object to that as immaterial, if the Court please.

The COURT.—Objection sustained.

Q. Well, you saw him there?

A. I saw Mr. Deal.

Q. And you then handed the keys to him through the agency of one of your relatives? [113—84]

A. I did.

Q. On direct examination, Mr. Hering, you spoke about there being a different safe when you went there from the one that was there when you left?

Mr. CRANE.—That is objected to, if the Court please, as immaterial, not covered by any of the issues in this case. I asked the witness to confine his testimony, if you will remember, to the safe described in this action.

The COURT.—Overruled.

Mr. CRANE.—Exception.

The COURT.—Exception allowed.

Q. What was the character of the safe when you went there, Mr. Hering?

A. There was just—well, I would call it a large

(Testimony of Ed A. Hearing.)

iron box, probably two foot and a half high by a couple of feet square with a hasp and a padlock. I think it was put in there during my employment there, and we used it, as I said, to store the registered mail in.

Q. Do you know what became of that box?

A. Yes, sir.

Mr. CRANE.—Objected to as immaterial.

The COURT.—Objection sustained.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

Q. Was there a change made in the safe or the container for registered mail during the time you were there; that is, was there a change made, was that iron box taken away? A. It was. [114—85]

Q. And do you know where this other safe came from, the safe that was there the balance of the time you were there in the employ of the postoffice?

A. Yes, sir.

Q. Where did it come from?

A. From the N. C. Company.

Q. And after that safe came what was it used for as regards registered mail?

A. Used to deposit the incoming mail. When I checked in the jackets and registered mail in the evening I put it in this safe for distribution in the morning. When I made up the dispatch in the evening I put the brass locked pouches in when there was room in the safe to do that and the jackets and other registered matter in this box for

(Testimony of Ed A. Hearing.)

safekeeping until it was dispatched in the morning.

Q. Did the Government furnish a safe in which registered matter should be stored?

Mr. CRANE.—If you know, Mr. Hering.

Mr. CLARK.—Yes, if you know, Mr. Hering.

A. It would depend, your Honor, upon what "knowledge" means.

The COURT.—Well, you know what it means, Mr. Hering.

A. I know that this safe was the property of the N. C. Company, because there was a little—not exactly difficulty, but there was considerable talk in the office about our not having any place to deposit this mail. I was a little worried over it myself, and Mr. Deal to my knowledge applied for a safe, but it seems [115—86] he didn't get it, and if my recollection is right he had Mr. Wetzler go to Mr. Richmond or somebody in the N. C. Company and get this safe, which was the property of the N. C. Company, either borrowed or—I don't know how he got it.

Q. That was for the purpose to use for putting the registered mail in?

A. Yes, sir, to safeguard these packages which heretofore we had been leaving during the period in open wire baskets.

Q. Did you notice anything about either safe when you were in there that night, Mr. Hering?

A. I don't ever remember even looking at them, Mr. Clark. I just passed by them on the way to the key rack.

(Testimony of Ed A. Hering.)

Q. In order that the jury may understand the situation of the difference pieces of furniture in the postoffice I would ask you where this small safe was, the safe in which you kept registered mail; where was it as regards the work-room?

A. Well, I was standing at the work-room table. Now it would be practically within the railing here.

Q. Well, was it next to the window or was it next to the grill work between the main work-room and the smaller room?

A. The safe is directly in front of one of the windows. The small safe, and the key-rack is back of that. I had to pass in to the cage or the railing, the wire railing, past Mr. Deal's desk and this safe, turn to the right for the key-rack.

Q. Then the safe was up against the window, was it? [116—87] A. Yes, sir.

Q. Against the wall on the east side of the post-office building?

A. On the sidewalk side, yes, sir, directly against the wall.

Q. And which way did the door swing in facing —I suppose the back of the safe was against the east wall of the postoffice? A. Yes, sir.

Q. And when the door was swung open which way did it swing? A. To the right, I think.

Q. And that was the safe—about how high did it stand?

A. Probably two feet; two and a half.

Q. It didn't come up to the window-sill?

(Testimony of Ed A. Hering.)

A. I think not. I think the safe itself would not come that high, although it might. I wouldn't state positively. There is always baskets and things setting on top of it.

Mr. CLARK.—That's all.

Redirect Examination.

(By Mr. CRANE.)

Q. Mr. Hering, when you refer to Mr. Wetzler you mean Mr. Wetzler, the postoffice Inspector, do you? A. Yes, sir.

Q. Now, Mr. Hering, the night that you put the papers inside of the work-room and distributed them, how many times had you put them in there prior to this during that month, if you remember?

A. Well, I don't recollect, but I don't think at any time; because I was—I generally sent one of the boys, my [117—88] own boys, they were acting as paper carriers, with the mail; but, as I explained, it was necessary to go there that night in order to keep my appointment, and sent the boy home.

Q. Prior to this time, as I understand you, you would get the papers down there before the postoffice closed, is that the idea? A. Yes, sir.

Q. Mr. Hering, regarding the safe, you say Mr. Wetzler made arrangements for it?

A. I am not positive; that is just my recollection. I remember that on the first demand we didn't get it, because I had to leave the registered mail in the baskets, and we didn't like to do it, and there was some little difficulty in getting it, and that is just

(Testimony of Ed A. Hering.)

my recollection. I think it was Mr. Wetzler went to Mr. Richmond or the manager and got it finally.

Q. It was brought in there for the purpose of keeping registered mail in, was it?

A. Yes, sir, as far as my part of it was concerned. There were other things kept in it.

Q. You don't remember whether Mr. Wetzler so instructed you to keep registered mail in that or not, do you?

A. No, he did not, not with that safe. He probably did with the other safe, because I received a great part of my instructions as dispatching clerk from Mr. Wetzler.

Mr. CRANE.—That is all.

(Witness excused.)

Whereupon an adjournment was taken until Wednesday, February 18, 1925, 10:00 A. M. [118—89]

MORNING SESSION.

Wednesday, February 18, 1925, 10:00 A. M.

The COURT.—In view of the fact that Juror Stickex has been removed from his hotel to the hospital and the doctor advises me that he won't be able to be out for about ten days probably, I would like to know what the attorneys consider it advisable to do.

Mr. CRANE.—As far as the Government is concerned, we are willing to let the record show we will stipulate to go ahead with eleven jurors.

The COURT.—Very well.

Mr. CLARK.—If the Court please, on behalf

(Testimony of G. B. Erwin.)

of the defendant United States Fidelity & Guaranty Company we stipulate that the case may continue and be tried with eleven jurors.

Mr. ROTH.—On behalf of defendant Deal it is stipulated that we will continue with the eleven jurors that are now in the box.

The COURT.—Very well.

TESTIMONY OF G. B. ERWIN, FOR PLAINTIFF (RECALLED).

G. B. ERWIN, recalled as a witness on behalf of the plaintiff, further testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. Mr. Erwin, I believe you already testified you were formerly United States Attorney?

A. Yes, sir. [119—90]

Q. I will ask you, Mr. Erwin, if you originally filed this action as United States Attorney?

A. Yes, sir.

Q. Mr. Erwin, did you file this action at the request of the Treasury Department and under authority of the Attorney General of the United States? A. Yes, sir.

Mr. CRANE.—That's all.

Mr. CLARK.—No questions.

Mr. ROTH.—I want to ask Mr. Erwin a question.

(Testimony of G. B. Erwin.)

Cross-examination.

(By Mr. ROTH.)

Q. Mr. Erwin, did you not request the Attorney General for permission to bring this suit?

A. No, sir.

Q. You did not make a request? A. No.

Q. Do you know if the request was made from here?

A. I do not know. My instructions came direct from the Treasury Department.

Mr. ROTH.—All right. That's all.

(Witness excused.) [120—91]

TESTIMONY OF GEORGE BENTLEY, FOR PLAINTIFF.

GEORGE BENTLEY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. Your name is George Bentley?

A. Yes, sir; it is George Bentley.

Q. Where do you now reside, Mr. Bentley?

A. My residence is Berkeley, California.

Q. Mr. Bentley, did you formerly reside at Fairbanks? A. Yes, I did.

Q. Were you employed at the First National Bank at Fairbanks in September of 1921?

A. Yes, I was.

Q. I will ask you, Mr. Bentley, if you remember on the 15th of September of 1921 of taking a pack-

(Testimony of George Bentley.)

age of currency from the bank to the postoffice at Fairbanks, Alaska?

A. Yes, I remember very well.

Q. Now, Mr. Bentley, were you present in the bank at the time that this money was counted and put in the package and sealed?

A. Yes, I was present.

Q. Who put it in there?

A. Mr. Hutchinson put it in the sack.

Q. And who witnessed the sealing and the counting of it? A. I witnessed the sealing.

Q. And how much currency was contained in that sack, if you remember?

A. A little over ninety-nine hundred dollars.

Q. A little over ninety-nine hundred dollars? [121—92] A. Yes.

Q. That was currency and silver, was it?

A. Well, yes, a little over ninety-nine hundred dollars in currency and a small amount of silver.

Q. Mr. Bentley, who delivered this package to you at the bank?

A. Who delivered it to me at the bank?

Q. Yes.

A. Why, Mr. Hutchinson just handed it to me and asked me to register it.

Q. And what did you do with it then?

A. I took it immediately over to the postoffice and registered it.

Q. And you may state whether or not you got the registry receipt for it?

A. Yes, I got the registry receipt for it.

(Testimony of George Bentley.)

Q. And what did you do with that receipt?

A. Brought it back to the bank.

Q. Did you stop anywhere between the bank and the postoffice?

A. No. Made no stop going or coming.

Q. You may state whether, if you know, that package was in the same condition when it went into the postoffice as it was when it left the bank?

A. Yes, it was in the same condition.

Q. Mr. Bentley, did you pay any postage that day? A. I put a ten cent stamp on it.

Q. What kind of a stamp?

A. Just an ordinary ten cent postage stamp, and I put on the regular franked sticker that was provided for such purposes. [122—93]

Q. Now, was the ten cent stamp a postage stamp or a registry stamp?

A. It was just a registry stamp.

Q. Why didn't you pay any postage on it, if you know?

A. Because we were provided with frank stickers to send like packages of currency to the Commission.

Q. Do you know why you were provided with stickers?

A. Well, as I understood it, it was Government matter and carried like that, carried free transportation.

Q. If you remember, who signed the registry receipt there at the window and registered it for you?

A. Why, Miss Houck made out the receipt.

(Testimony of George Bentley.)

Q. And she was at the window at the postoffice that day? A. Yes.

Q. Mr. Bentley, do you remember who that money was addressed to?

A. Why, I believe it was addressed to Frank Doner.

Q. And what point, if you remember?

A. Well, if I remember rightly, it was just Nenana.

Q. I hand you Plaintiff's Exhibit "A" and ask you if you recognize the address on there and if that is the—

A. (Interrupting.) Yes, I believe this is it.

Q. That's it? A. Yes.

Mr. CRANE.—You may cross-examine.

Mr. CLARK.—No questions.

(Witness excused.) [123—94]

TESTIMONY OF J. S. RODEBAUGH, FOR PLAINTIFF.

J. S. RODEBAUGH, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. What is your name?

A. J. S. Rodebaugh.

Q. Where do you reside, Mr. Rodebaugh?

A. Fairbanks.

Q. And what is your occupation?

(Testimony of J. S. Rodebaugh.)

A. Conductor for the Alaska Railroad.

Q. How long have you been employed for the Alaska Railroad?

A. Since they absorbed the Tanana Valley in June, 1917.

Q. Where were you employed in September, 1921, Mr. Rodebaugh?

A. For the Alaska Engineering Commission.

Q. And what were your duties at that time?

A. Conductor between—

Q. (Interrupting.) As conductor for the Alaska Railroad I will ask you if you had charge of the train which ran from Fairbanks to Nenana on the 15th and 16th of September, on the 16th of September, 1921? A. I did.

Q. You were personally in charge of that train that day? A. I was.

Q. Mr. Rodebaugh, on that day do you remember leaving Fairbanks for Nenana and the mail being loaded on the train that day? A. No, I don't.

Q. Which one of the crew loaded that, if you know?

A. Nordby, the brakeman, was presumed to have received it. [124—95]

Mr. CLARK.—We object to it. He says he knows nothing about the mail being loaded on the train, therefore it would be hearsay as to who did it. Therefore we object as hearsay.

The COURT.—Objection overruled.

Mr. CLARK.—Exception.

The COURT.—Exception allowed.

(Testimony of J. S. Rodebaugh.)

Q. If you know, what was the usual manner in handling the mails on that train?

A. There was no baggageman or expressman on there, which should have been according to the rules and regulations of the operation of a railroad. The mail was usually delivered to the warehouseman, who in turn loaded it into the car and it was received, and the car was usually set out at the dock, or at the slip at Nenana, and the agent at Nenana would usually receive it and transfer it to the boat.

Q. Now, Mr. Rodebaugh, calling your attention to the train of that day, I will ask you first about what was your running time between here and Nenana? A. Approximately three hours.

Q. Was there several way stops? A. Yes.

Q. I will ask you, Mr. Rodebaugh, with the exception of the incident of the fire, which I will inquire into later, approximately what was the longest time you stopped at any one point between here and Nenana? A. I would say ten minutes.

Q. I will ask you about what was the running time, or the longest time that the train was in movement between any two stops? [125—96]

A. Twenty minutes, approximately.

Q. Mr. Rodebaugh, upon leaving each station you may state whether or not the door of the car would be closed and hooked?

A. In every instance.

Q. And upon the arrival at every station would

(Testimony of J. S. Rodebaugh.)

the car door be unhooked and opened by a member of the train crew? A. Always, yes, sir.

Q. Mr. Rodebaugh, I will ask you if a fire occurred that day between here and Nenana?

A. Yes.

Q. I will ask you first to just briefly describe or tell us the conditions surrounding that fire and what happened at that particular fire?

A. Well, at Mile—about 423½, I presume, approximately, there was fire discovered in a gondola load of wood, 24-inch wood, that was being moved to Nenana for fuel for the locomotive, and before the fire was discovered it had gained quite a start. We stopped the train by the emergency valve in the rear of it and started to put this fire out with buckets. We saw that the fire had gained quite a headway, and we moved ahead then approximately a quarter of a mile to Little Goldstream and put a syphon in the creek there and got our fire apparatus working and extinguished the fire by that method.

Q. I will ask you to briefly describe the position of the train, and particularly the position of the coach or car carrying the mail relative to the rest of the train when it was pulled up at Goldstream? [126—97]

A. The car of wood was next to the locomotive, the car carrying the mail was immediately behind that, and the car with the mail in it would be standing on the fill, or rather the approach of the bridge. There was an embankment there of ap-

(Testimony of J. S. Rodebaugh.)

proximately four to six feet. It would be very difficult for—

Mr. CLARK.—We object to that as not responsive. That is not in response to his question.

The COURT.—Objection sustained.

Mr. CRANE.—Very well.

Q. To your knowledge was the door of the car containing the mail pouch that day opened or closed at the time of the fire? A. No, it was not.

The COURT.—The question was, was it open or closed?

A. Not during the course of the fire. There was nothing to warrant it, no freight to be loaded or unloaded and no tools in it.

Q. Had it been open or closed would you have noticed it?

A. Immediately. Either myself or someone else there of the brakemen.

Q. Now, Mr. Rodebaugh, I will ask you to explain briefly the situation regarding fires during that month.

A. We were using a wood burning locomotive. I don't just remember what mesh it would be over it, the mesh of the spark-arrester that we had. I know that chunks of charcoal probably as large as the end of your thumb was continually falling from that stack, and anywhere one of those would light there would be a little bunch of dry grass along the right of way, or be a little bunch of birch bark in a car, or in the crack of a box-car, [127—98] or anything like that, it would immediately take fire.

(Testimony of J. S. Rodebaugh.)

and we were continually on guard and fighting those fires. There were times when we had to stop the train to put the fire out of the roof of the coach, or the floor of the coach, or the coach where the passengers ride, and more particularly wood cars if we were hauling one up next to the locomotive, because the sparks had a good chance to get around in the layers of the wood in the birch bark and there would ignite and blaze.

Q. In that would you be more particular, then, in keeping close watch on the cars on account of fire?

A. On account of fires continually watching them. Shortly before that we had a carload of meat burn up and it was quite serious, and we were always very cautious because we carry dynamite usually in the cars. We carry dynamite as a rule in the cars, and regardless of whether it was a station order or not we put it next to the door so in the event a fire got a start on us we could get the dynamite the first thing before going any further, and continually watching and looking for fires because we expected them at any hour or any time.

Q. Explain, Mr. Rodebaugh, just briefly about this spark arrester and how it happened to be in the condition that it was to throw out such large chunks?

A. Well, it is nothing more than a net hood over the stack of the boiler, you see, and, for instance, if the engineer or fireman in putting his injector on neglected it for just a few seconds, or a minute, the

(Testimony of J. S. Rodebaugh.)

boiler would fill up with water, and working steam constantly there would be wet steam getting out the [128—99] stack. That would have a tendency to clog up that net, and, of course, the charcoal or sparks continually going up against there would be sort of matted there on the net. Well, then there was nothing to do but to exhaust to force the smoke back through the fire-box and, as we used to say, smoke them out of the cab, meaning the engine crew. Then in order to overcome that stop a good many times and go out there with a club, or in some cases a pick, and beat that stack in order to knock that stuff loose down into the smoke box of the boiler, and in probably a good many cases ram the pick in there, and which would, of course, drive a hole in there maybe an inch square, and of course that would allow large sparks, large chunks of charcoal, rather, to be throwed out through that spark-arrester.

Q. I will ask you if the mail was handled in the usual and ordinary manner that day?

A. Yes, that was their system of handling mail, to deliver it in the car and unload it at its destination by whoever was in charge there.

Mr. CRANE.—You may inquire.

Cross-examination.

(By Mr. ROTH.)

Q. Do you have any distinct recollection at all about the mail that day?

A. No, Mr. Roth, I don't any more than the brakeman said that—

(Testimony of J. S. Rodebaugh.)

Q. (Interrupting.) Never mind, I am asking you about your own personal recollection? [129—100]

A. I did not see the mail-sack, no, sir.

Q. You didn't see it at all?

A. Absolutely not.

Q. Then so far as your stating it was handled in the usual manner is simply because you don't know, you haven't heard of anything, of any unusual occurrence with reference to the mail that day?

A. We were not required to receipt for mail any more than it was put on the train, and if it was—the destination, for instance, like Fox, Gilmore, where some other train crews were handling it, it was put off, because we always expected a mail-sack on those stations on mail day. But, for instance, mail going to Nenana was loaded here, whoever happened to load it. It was delivered at the warehouse, some days at the warehouse, some days at the door of the car, by the expressman. It was loaded in the car, as I stated, was spotted at the slip at Nenana. Whoever was in charge there unloaded it and turned it over to the boatman, who usually was waiting for it.

Q. You kept no record of it?

A. Absolutely none.

Q. And you have no record of the mail that day?

A. Not on that day.

Q. Now who was the engineer on the engine that day? A. Christonson.

(Testimony of J. S. Rodebaugh.)

Q. Is he present in the courtroom?

A. No, he isn't. He is outside.

Q. Who was fireman? A. Mr. Lindgren.

Q. Where is he? [130—101]

A. He is present.

Q. Now how many cars did you have on that train that day?

A. Five. A carload of wood, two merchandise, as I recollect, and two coaches.

Q. Wasn't there only one coach?

A. That I wouldn't swear to.

Q. Did you at any time make up a list of the passengers that were on the train that day?

A. I did not.

Q. Do you have any recollection of any of the passengers of that day?

A. Yes, I have a recollection of some.

Q. Who were they?

A. Mr. Struthers, Mr. Fairborn that used to be with the A. Y. N., Mr. Sterling and his wife.

Q. What Sterling was that?

A. Hawley Sterling, the surveyor. And I am not so sure about others.

Q. Do you know whether or not you got out on time that morning from Fairbanks?

A. If we didn't it would be a matter of maybe five or ten minutes late maybe, something like that.

Q. You have no recollection about that or no record?

A. Well, no. There should be a record of it; yes.

Q. Where would the record be if there were any?

(Testimony of J. S. Rodebaugh.)

A. If the record hasn't been destroyed it would be at Anchorage, because we were required to turn our train books in as they are filled at the end of each three or four months, required to turn them in to Anchorage. But now at that time I think those reports went in to the Tanana Valley over here, and, if I remember right, [131—102] when the Commission, that is, the Anchorage officials, consolidated this northern division they gathered up that stuff over there and, if I remember right, took it out and burned it. They had a big bonfire in front of the depot there and burned up all the old Tanana Valley reports prior to that time.

Q. Now what you say with reference to the fastening of the box-cars in which this mail was carried generally is simply a general statement on your part? You don't mean to say that you have a particular recollection about the fastening that was on the particular car that carried this mail that morning, do you? A. Yes, I have, Mr. Roth.

Q. All right now, what kind of fastening was it?

A. A *hook* affair; just merely a hook. We were never required to seal cars or anything like that.

Q. They were not locked in any way?

A. Not locked, but hooked and—

Q. (Interrupting.) Now, there was a door on each side of the car?

Mr. CRANE.—Let him finish his answer.

Mr. ROTH.—All right.

A. Yes, a door on each side of the car with a hook, and it was well secured. And no such a

(Testimony of J. S. Rodebaugh.)

thing as the thing working out and the motion of the car allowing the door to open enroute.

Q. Do you wish to be understood as saying that a person who was inside of the car there when it was hooked could not open it from the inside?

A. No, he could not.

Q. Could not? [132—103]

A. That would be absolutely impossible.

Q. Couldn't even if he had tools?

A. Not if he had tools, unless he had a hammer or something and would knock the board off and reach out, otherwise it couldn't be done.

Q. Of course, you don't pretend to say that as far as this particular day is concerned, the 16th day of September, 1921, that when you left the depot that you have any independent recollection, any more than your general custom, that both of those hooks were fastened when you left.

A. It was usually the duty of myself and the crew to keep constant lookout for those doors, because in the event a door left the depot unhooked it wouldn't go but a short ways until, as I explained, the motion of the train would work it open. It works on hinges, that is, on wheels, rather, a slide door on a track. The motion of those cars would work it open. Then the car, as a rule, would be loaded clear to the doors and the roof with freight. Well, that freight constantly—the motion of the car would constantly shift that freight around, and it wouldn't go probably half a mile until we would be losing our freight, see?

(Testimony of J. S. Rodebaugh.)

Q. I understand that.

A. And for that particular reason we were very cautious to see that doors were locked, that is, hooked, rather, before we left the depot and at every station.

Q. I am conceding, Mr. Rodebaugh, you were very careful. A. Very careful.

Q. But now I come right back to the main question, and I want you to answer it, see. Other than your custom, [133—104] customary way of doing that business, you don't pretend to swear here that you have an independent recollection now as to whether or not both doors were fastened when they left Fairbanks on that morning?

A. Yes, I can say they were fastened every morning, and that morning as well, because it was my duty to see that they were fastened before we left the depot.

Q. So you went down and looked, and you will say now that you recollect that they were both fastened?

A. Yes. The last duty was to give instructions to the engineer, for instance, and that required my presence at the car door, you might say.

Q. Now, where was this car with reference to the passenger coach that carried this mail?

A. It was next to the car of wood.

Q. How far from the coach?

A. One car-length.

Q. How is that?

A. One car-length from the coach.

(Testimony of J. S. Rodebaugh.)

Q. There was a car, then, between the coach and the car that carried this mail?

A. That's it. What we call the way car, and that was the car that was supposed to have had the mail in it.

Q. Do you recollect taking this car that morning from the east side of the warehouse?

A. Yes, sir, I was present when the switching was done.

Q. Well, do you recollect that independently for that particular morning? A. Yes.

Q. All right. How long was that taken out there before [134—105] you pulled out on your regular trip for Nenana?

A. I would say twenty minutes, fifteen to twenty minutes, switched across.

Q. When you pulled that out there did you go inside, or before you pulled it out did you go inside of that car? A. No.

Q. Do you know whether or not there was anybody inside of that car?

A. Yes, I have a personal knowledge that the brakemen were in there loading the freight.

Q. When you pulled it out?

A. Not when we pulled it out, no, but the last act loading the freight, got out and closed the door, pulled up over the switch and pulled down to the depot to finish loading our baggage.

Q. Now you say that you made several stops, or you stopped at any rate before you got down to the place where this car was discovered on fire?

(Testimony of J. S. Rodebaugh.)

A. Yes, a number of stops.

Q. You were watching for fires very carefully all the time? A. Always.

Q. But on this particular day the fire got under considerable headway before you discovered it?

A. Yes.

Q. Notwithstanding your vigilance; is that right?

A. That's it.

Q. How far was the fire advanced before you discovered it?

A. It was advanced beyond control, that is, bucket control, for the reason that the wood was throwed into the car in a jumbled manner, it wasn't stacked in there in ricks, [135—106] you understand, as it should have been, but they were hurrying up to get a carload of wood to Nenana for fuel and was thrown in there promiscuously, stacked like hay. Down on the floor, under this car where the floor was was where the fire was. To throw water on there it would simply roll off and wouldn't have any action on the car in under.

Q. What kind of wood was that?

A. Spruce wood, and maybe an occasional stick of birch wood with it.

Q. Do you know that?

A. No. I will say spruce.

Q. What length was that? A. 24-inch.

Mr. CRANE.—I object to that as immaterial, if the Court please. I don't mind counsel going into the question of the fire, but the size and dimension and color of the wood I don't think is material.

(Testimony of J. S. Rodebaugh.)

Mr. ROTH.—If the Court please, it seems strange to me that counsel thinks I haven't the right to cross-examine the witness on the very proposition that he brought out on direct examination.

Mr. CRANE.—I don't think you have to that extent.

Mr. ROTH.—That is a peculiar rule of law that is being sprung here on the question of cross-examination.

Mr. CRANE.—I don't see where the size of the wood has anything to do with the rifling of the pouch. [136—107]

The COURT.—I think it is immaterial. The objection will be sustained.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

Q. Where did you stop the first time, Mr. Rodebaugh, on the way down there?

A. The first trip? Esther Siding.

Q. The first stop?

A. The first stop Esther Siding.

Q. How long did you stop there?

A. Approximately five minutes.

Q. What was done there?

A. A little freight put on.

Q. Was any taken off?

A. Not that I remember, no.

Q. Where was your next stop? A. Happy.

Q. What was done there?

A. Let off a passenger or two. I don't remember of any freight being unloaded there.

(Testimony of J. S. Rodebaugh.)

Q. Do you remember who the passengers were?

A. No, I don't.

Q. How long did you stop at Happy?

A. Five or six minutes.

Q. All right. Now where was your next stop?

A. Bartlett's.

Q. What did you do there?

A. Set out a couple of wood cars, a couple of empty wood flats.

Q. Where did you take those flats from? [137—108]

A. Fairbanks.

Q. When you started out with those wood flats where were they with reference to the passenger-coach? A. Shoved ahead of the engine.

Q. Oh, they were ahead of the engine?

A. Being shoved by the engine.

Q. I see. How long did you stop there at Bartlett's wood camp?

A. Long enough to make the switch. Approximately five minutes.

Q. And where did you next stop?

A. At the water tank at 456.

Q. How long did you stop there?

A. Five or six minutes taking water.

Q. You stopped there just to take water?

A. Yes.

Q. You didn't put off any freight there?

A. Not that I remember.

Q. Or take on any freight?

A. No recollection of it.

(Testimony of J. S. Rodebaugh.)

Q. Then where was your next stop?

A. William's wood camp. Left a flat car there. I don't remember whether one or two.

Q. You shoved them ahead also?

A. Shoved them ahead also.

Q. And how long did you stop there?

A. The usual length of time. Five or six minutes.

Q. Did you take off any freight or put on any freight there?

A. Not that I remember, no.

Q. You don't remember. And your next stop? [138—109]

A. Let a woodchopper or passenger off, I think, at Wagner's wood camp. That is about Mile 450.

Q. And what did you do there?

A. Let off a couple of passengers.

Q. Do you know who they were?

A. No. I don't remember.

Q. Did you put off any freight there?

A. Not that I remember.

Q. Or take on any? A. No.

Q. And your next stop?

A. The next stop would be Dunbar.

Q. Well, was the fire after you passed Dunbar?

A. The fire was below Dunbar, yes.

Q. Below Dunbar?

A. Yes, the fire was below Dunbar. But Dunbar was the first stop after we left Wagner's.

Q. How long did you stop at Dunbar?

A. Approximately ten minutes.

(Testimony of J. S. Rodebaugh.)

Q. What did you do there?

A. A water-tank there. That is at the water-tank a little on this side of Dunbar. Stopped there and took water, then pulled down probably a mile to the depot, and I don't remember whether we unloaded any freight or not, but usually we had a little jag of freight for Dunbar.

Q. You don't remember how long you stopped at Dunbar? A. Don't remember; no.

Q. How far was it from there to where that fire was below Dunbar?

A. Dunbar 432—about six and a half miles. [139—110]

Q. Now is Goldstream up the track at that point?

A. About a half a mile beyond there. Goldstream is Mile 433, Little Goldstream.

Q. Oh, Little Goldstream?

A. Little Goldstream, yes.

Q. Oh, I see. Now did the passengers help put out this fire?

A. Yes, they were helping with the water, that is, when we were using buckets; and, in fact, if I remember, a couple of them got up in there and started to throw out some wood.

Q. Do you remember who they were?

A. No, I don't remember who they were. That was a common occurrence; when there is anything going wrong passengers get out and assist, you know.

Q. You don't recollect now who it was that as-

(Testimony of J. S. Rodebaugh.)

sisted you in putting out that fire, or anybody that assisted you? A. No, I don't.

Q. All the train crew did?

A. The train crew was all there.

Q. When you were handling buckets all the train crew was there?

A. They were all there, and a couple of the passengers passing it from the manhole in the engine across the top of the car to the wood where they were throwing it on.

Q. And you were very busily engaged in fighting that fire while you were there?

A. Not so much that way as watching the work of others.

Q. Well, you were working yourself, weren't you? [140—111]

A. Some, yes, but at the same time watching the progress.

Q. Well, weren't you helping carry or lift that water?

A. Oh, yes, occasionally take a bucket and douse it on there.

Q. Weren't you in the chain that ran down and dipped the water and passed it to the others?

A. Not in the chain, no, because there was no chain to it. It was just haphazard and was just a matter from the tank across to the car maybe twenty feet, something like that. Part of the time they would be walking across and part of the time handing it across to the other man.

Q. When you got down to Goldstream it was

(Testimony of J. S. Rodebaugh.)

quite a little while before you got the syphon to work?

A. Well, yes, I would say about five minutes.

Q. And they used the buckets until about that time?

A. No, because apparently there was nothing coming up out of the car but smoke. The blaze was in under and there was not much effect in their throwing much more water on it until we could get a hose and a volume of water there.

Q. How long were you at that fire there?

A. I just don't remember, but probably a good half hour.

Q. Might it not have been an hour?

A. Hardly took that long, but it was anyway a half an hour lost fighting fire.

Q. Do you know which car that mail was in on the way down there?

A. No, not absolutely, anymore than the brakeman stating that he had saw it in this particular car. [141—112]

Q. That brakeman is here, is he?

A. Yes. He will be in this afternoon, I understand.

Q. Now, which particular car do you refer to?

A. One next to the wood-car.

Q. And is that the one you called the way car?

A. That is the one I called the way car, we were unloading freight out of on the way down.

Q. But between stations or except when you were

(Testimony of J. S. Rodebaugh.)

either loading or unloading freight there was no one supposed to be in that car at all? A. No.

Q. And it was neither sealed nor locked?

A. Hooked.

Q. I say, neither sealed nor locked with a lock and key? A. Neither.

Mr. CRANE.—He testified to that. It is a repetition.

Q. And every time they wanted to take out freight of course it was opened up? A. Yes.

Q. Do you know whether or not it was opened up when you were down there at that fire?

A. It was not to my knowledge.

Q. That is, you didn't see it opened? A. No.

Q. You didn't keep your eye on all those passengers all the time you were down there, did you?

A. Oh, no; no more than if I saw anybody going around the car I would know it was an irregularity and it would [142—113] immediately have been brought to my attention.

Q. But you couldn't be on both sides of that train at the same time?

A. Not at the same instant, no.

Q. Especially when you were fighting fire?

A. Oh, no, any more than on top of this car, crossing over it from time to time across the top of the gondola.

Q. And the cab passengers were going back and forth from the coach on both sides, weren't they?

A. Yes, on both sides of the car.

Q. When you pulled out from the first place that

(Testimony of J. S. Rodebaugh.)

you stopped with that fire, why, when you pulled down to Little Goldstream there you left passengers behind, didn't you, that walked down?

A. I don't remember.

Mr. ROTH.—You don't remember that. That's all.

Redirect Examination.

(By Mr. CRANE.)

Q. Mr. Rodebaugh, how large is that embankment there at Little Goldstream where the way car was on?

A. I would judge four to six feet high.

Q. And about how much space is there between the side of the car and the edge of the embankment, or is there any?

A. There would be none, because it would be practically sheer from the end of the ties off, which would be the exact width of the car.

Q. Then if anyone entered the car would they have to climb up the embankment?

A. Yes, it would be quite a task for a man to get up the [143—114] embankment and open the car door and get in.

Q. Standing on the ground at the side below it could a man reach up and unhook the car from the embankment?

A. A tall man could, I believe, by hanging onto some part of the car, rod or something, for instance, in doing it.

Q. Now regarding this fire, I will ask you if the fire was in the bottom or top of the wood-pile?

(Testimony of J. S. Rodebaugh.)

A. The fire started in the bottom and then, of course, worked up, beause we was able to get at it, but there was still fire and smoke left under this wood which we couldn't get at with buckets.

Q. That evening, Mr. Rodebaugh, after you were back in Fairbanks you were interviewed and made statements to Mr. Wetzler, did you not?

A. Yes.

Q. And is that the reason this is so fresh in your memory?

A. Yes. And then it has been constantly talked over, too, to a certain degree among the employees there, men whom I work with.

Mr. CRANE.—That's all.

Recross-examination.

(By Mr. ROTH.)

Q. Well, did you sign the statement? A. Yes.

Q. Have you read that statement over recently?

A. No.

Q. You haven't seen it recently? A. No. [144—115]

Q. You are not testifying with reference to that statement now?

A. No, no, I am not, any more than this thing, as I explained, has been constantly brought up.

Q. Did you keep a copy of that statement?

A. No, I kept no copy of that statement.

Mr. ROTH.—That's all.

(Witness excused.)

TESTIMONY OF J. F. STRUTHERS, FOR PLAINTIFF.

J. F. STRUTHERS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. State your name, Mr. Struthers.

A. J. F. Struthers.

Q. And your occupation?

A. Manager of Waechter Brothers.

Q. Mr. Struthers, I will ask you if you were a passenger on the train from Fairbanks to Nenana on the 16th of September, 1921? A. I was.

Q. On that day going from here to Nenana do you remember of a fire occurring down about Little Goldstream? A. Yes, I remember a fire.

Q. I will ask you as a passenger if you got out of the coach and went up to the car that was afire? [145—116] A. I did.

Q. At the first stop or the second?

A. Well, at the first stop.

Q. At the first stop. And after they pulled on up to the second stop what did you do?

A. I got out of the coach and walked up to the gulley where they were getting the water on the opposite side from where they were working.

Q. And did you go on up to the fire? A. No.

Q. Why?

A. I stood there for a while and then I started

(Testimony of J. F. Struthers.)

to go up to the fire, and I considered—that is, I walked up to the trestle and considered it wasn't wise to try and cross it.

Q. And was the coach known as the way coach between you and the fire? A. Yes.

Q. Mr. Struthers, I will ask you who was with you that day going down?

A. Mr. Fairborn, Jim Fairborn.

Q. That is the agent of the Alaska-Yukon, is it?

A. Yes.

Q. And at that time did Mr. Fairborn get out and assist them in fighting fire?

A. Yes, we got out together, and Mr. Fairborn got up on the train and helped them throw off the wood, or started to throw off the wood.

Q. After they pulled out from their first stop up to Little Goldstream did Mr. Fairborn remain on the wood-car [146—117] or come back?

A. No, he remained on the car.

Q. And when did you next see him?

A. Well, after the fire was out and we had started again he came back in the coach.

Q. And the two of you rode on together on in to Nenana? A. We did.

Mr. CRANE.—Cross-examine.

Cross-examination.

(By Mr. CLARKE.)

Q. How long would you say, Mr. Struthers, they stopped at the first stop when the fire was first discovered?

(Testimony of J. F. Struthers.)

A. Why, I should say about—it wasn't very long; five or ten minutes.

Q. Well, what did they do there at the first stop towards putting out the fire?

A. Why, they threw the wood off, started to throw the wood off the car, off the top, on both sides.

Q. Now when the train first stopped did you go up forward to see what the trouble was?

A. Yes, we got off and walked up to the wood-car, or walked up—

Q. (Interrupting.) And in going up to the wood-car you went past the freight-cars that were between the passenger-coach and the wood-cars?

A. Yes.

Q. And do you remember them forming a bucket line and getting buckets and trying to put the fire out that way [147—118]

A. Well, there wasn't any water there except from the engine.

Q. There was no water at all there to put on the fire?

A. Except what they could get out of the tank of the engine. There was no bucket line that I—

Q. (Interrupting.) What was the appearance of that fire when you got there as to what stage it had reached? Where did the fire seem to be as far as the load of wood seemed to be?

A. Well, it was fairly well down in the load, and that was the idea of throwing off the wood on top.

(Testimony of J. F. Struthers.)

It wasn't burning on top very much, and they were throwing that wood off to get at the fire.

Q. Then when the train started up you got back into the coach?

A. Yes, I got back into the coach.

Q. And when it reached Little Goldstream you didn't go clear up to the fire then? A. No.

Q. How many passengers were on board that morning, if you remember?

A. Well, I don't remember. There were possibly eight or ten.

Q. Do you remember who they were?

A. I don't.

Q. You have ridden over that road a great many times, haven't you? A. Yes, quite a bit.

Q. And the station, some of the stations are on the right-hand side of the track and some on the left-hand side [148—119] of the track, are they not? A. Yes.

Q. And did you see them unloading freight that day?

A. I never paid any particular attention to it.

Q. Can you tell the names of any of the passengers except yourself and Mr. Fairborn?

A. Well, I don't remember for a positive fact who were on there except Fairborn and myself.

Q. Mr. Fairborn was going down to the boats at that time, was he?

Q. You were just going down to the boats?

Q. You were going on down river, too, were you, at that time? A. No.

(Testimony of J. F. Struthers.)

Q. You were just going down to the boats?

A. Yes.

Q. Now how long would you say was the second stop at Little Goldstream when they finally got the syphon to work to put out the fire?

A. Well, it was a half an hour or better.

Q. So all told with the two stops you think it was at least forty minutes?

A. Yes, I should think so.

Q. When the train first stopped do you know whether all the passengers went up front?

A. No, I don't, but quite a few of them did.

Q. And you paid no particular attention to what any of the passengers were doing; you simply went up front there to see the fire? A. That was all. [149—120]

Q. Well, did you see Mr. Rodebaugh there at that time? A. I don't remember.

Q. The train crew was engaged in trying to put out the fire? A. Yes.

Q. There was a whole lot of smoke there, was there not? A. Quite a bit of smoke.

Q. And you saw two or three people on top throwing off wood?

A. Yes, there were more than that.

Q. Do you remember on which side of the engine, from which side of the engine they were taking the water, which side of the tank they were taking the water to throw on the fire, or were they just up on the tank and throwing it right back on to the fire?

(Testimony of J. F. Struthers.)

A. Yes, just the top, throwing it back, and were throwing the wood off on both sides.

Q. And considerable smoke was coming out. Do you remember how many passenger-coaches were on that day? A. I think there were only one.

Q. Do you remember how many freight-box cars there were? A. I don't.

Q. The gondola was next to the—

Q. (Interrupting.) The wood-car was right back of the engine, yes.

Q. And did you notice any flats ahead of the train when you started out from Fairbanks?

A. No, I didn't notice the train much at all then.

Mr. CLARK.—That is all.

Redirect Examination.

(By Mr. CRANE.) [150—121]

Q. Did you and Mr. Fairborn both come back on the train the next day? A. Yes.

Mr. CRANE.—Back to Fairbanks. That's all.

Recross-examination.

(By Mr. CLARK.)

Q. Did you and Mr. Fairborn go over to Nenana?

A. No.

Q. You went to the boats. What boat was in that time, if you remember?

A. Well, I don't remember, but the boat was at what they call North Nenana at the dock waiting for the freight we had, then they were pulling out.

Q. And Mr. Fairborn came back to Fairbanks that day? A. Yes, we came back together.

(Testimony of R. R. Robinson.)

Mr. CLARK.—That's all.

(Witness excused.)

TESTIMONY OF R. R. ROBINSON, FOR PLAINTIFF.

R. R. ROBINSON called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. What is your name, Mr. Robinson?

A. R. R. Robinson.

Q. Where were you employed, Mr. Robinson, on the 16th of [151—122] September, 1921?

A. At North Nenana.

Q. And what was the nature of your employment? A. Station agent.

Q. I will ask you if on the 16th of September, 1921, if you remember that day of checking the mail off of the train and on to the ferry-boat at North Nenana?

A. No, I didn't check it from the train.

Q. Did you check it on the ferry-boat?

A. I saw it on the ferry-boat before receipting for it?

Q. Did you look at it and see that it was on the ferry-boat before you receipted for it? A. I did.

Mr. CRANE.—You may inquire.

Cross-examination.

(By Mr. CLARK.)

Q. You didn't receive it from the train?

(Testimony of R. R. Robinson.)

A. No, sir.

Q. And the first you saw of it it was on the ferry-boat? A. It was on the boat.

Q. Do you remember how many sacks there were?

A. There was one tie sack and one pouch.

Q. One tie sack and one pouch. The tie sack was a small sack, was it not?

A. I do not remember.

Q. You don't know how many sacks went down on that train that day, do you, how many sacks of mail?

A. No, I know nothing about the down river mail.

Q. You know nothing about what became of the mail when it was put off at Nenana until it was put on the ferry-boat? [152—123]

A. I didn't see it.

Q. And you say you checked it. Now what do you mean by checking it, just simply made a note of the number of sacks?

A. We got from Fairbanks a duplicate company waybill for all mail that come through. One bill went across the river with the mail, another one was receipted by me and returned to the Fairbanks office to make sure that the mail arrived safely at North Nenana.

Q. Do you remember how late the train was that day in getting into Nenana? A. No, sir, I don't.

Mr. CRANE.—Object to that as immaterial.

(Testimony of R. R. Robinson.)

Q. Was the boat there waiting for it when it got in?

A. I can't say positively. I believe it was.

Q. But you wouldn't be certain about that?

A. No.

Q. But after the mail had been put upon the ferry-boat by someone you noted that there were two sacks, a tie and a locked pouch, and you made note of that and returned your bill to Fairbanks?

A. Yes.

Mr. CLARK.—That's all.

(Witness excused.) [153—124]

TESTIMONY OF B. W. RANSTEDT, FOR PLAINTIFF.

B. W. RANSTEDT, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. You may state your name.

A. B. W. Ranstedt.

Q. Where do you reside, Mr. Ranstedt?

A. Portland, Oregon.

Q. And where were you residing in September of 1921, Mr. Ranstedt? A. Nenana.

Q. And by whom were you employed?

A. The Alaska Engineering Commission.

Q. Mr. Ranstedt, I will ask you if during the month of September, 1921, you were carrying the mail from the ferry-boat up to the postoffice?

(Testimony of B. W. Ranstedt.)

A. I did at that day, yes.

Q. I will ask you if on the 16th of September, 1921, you received the mail off of the ferry-boat at Nenana and carried it to the postoffice at Nenana?

A. I did.

Q. How many sacks, if you remember, did you receive? A. Two sacks.

Q. What kind of sacks were they?

A. One locked and one tie we called them.

Q. I hand you a mail sack marked Plaintiff's Exhibit "E" for identification and ask you if this is what you mean by a lock sack and if it is a similar sack you carried to the postoffice that day? [154—125]

A. Yes, it looks like the same kind of a sack that we call a lock sack.

Q. Was the sack which you received from the ferryboat at Nenana and carried to the postoffice at Nenana, referred to as a lock sack, was it locked when you received it?

A. There was a lock on it, yes.

Q. Did you go directly from the boat, from the ferry, to the postoffice?

A. Well, I walked from the ferry up to the head of the slip, we call it, on the dock, and Mr. Fairburn was there.

Q. Which Fairburn do you mean?

A. Dave Fairburn. And he says, "Hold on a minute, Pete," he says, "I got to check them," something to that effect, "just a second." So I dropped the sacks on the dock and he wrote some-

(Testimony of B. W. Ranstedt.)

thing down in a book, or on a slip of paper or something, and says, "All right, go on up with them to the postoffice."

Q. That took about how many minutes?

A. Oh, it was only a matter of a minute or two. But he picked up the sacks one at a time and he says, "All right, one lock and one tie," he says, "go on up with them, take them up to the postoffice."

Q. And did you go direct to the postoffice then?

A. I did.

Q. And was this sack at any time from the time you received it at the ferry-boat until you delivered it at the postoffice out of your possession?

A. No, not any more than when Mr. Fairburn picked it up and looked. [155—126]

Q. You were standing there at that time?

A. I was right there.

Mr. CRANE.—You may inquire.

Mr. CLARK.—No questions.

(Witness excused.)

TESTIMONY OF JAMES HAGAN, FOR PLAINTIFF.

JAMES HAGAN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. Your name is James Hagan?

A. Yes, sir.

Q. And what is your occupation?

(Testimony of James Hagan.)

A. Deputy United States Marshal.

Q. And where do you reside? A. Nenana.

Q. Were you residing at Nenana in September of 1921? A. Yes, sir.

Q. I will ask you, Mr. Hagan, if it was your custom to go over to North Nenana and meet the train? A. It was.

Q. Mr. Hagan, on the 16th of September, 1921, I will ask you if you were over at North Nenana when the train arrived? A. Yes.

Q. Were you there when they unloaded the baggage and the [156—127] mail? A. Yes, sir.

Q. About how long altogether did the transfer take, or how much time elapsed from the time the mail was unloaded off of the car until it was loaded on the ferry-boat and the ferry-boat pulled out?

A. Oh, it wouldn't take over half or three-quarters of an hour, I don't think.

Q. Mr. Hagan, just describe briefly what kind of a wharf or loading place that is there at North Nenana?

A. Well, it is just an ordinary dock, with a slip in it, a warehouse on one side, an open platform on the other.

Q. Did you see the mail unloaded that day?

A. Yes, sir. Seen it unloaded pretty near every time I was over there.

Q. And that day, did you see it loaded onto the ferry-boat? A. Yes, sir.

Q. You may state whether or not you rode across on that same ferry-boat? A. I did.

(Testimony of James Hagan.)

Q. Was the mail under your observation while you rode across?

A. Laying right there in the scow.

Q. If you know, who was the mail delivered to after you arrived over at Nenana?

A. I seen—I think it was this Pete Ranstedt. I seen him go down and get it.

Q. And did you then get off of the ferry-boat and go up town to Nenana?

A. I went up, followed on up shortly after Pete.

Q. Was Mr. Ranstedt, from the time he left the ferry-boat [157—128] until he arrived at the postoffice at Nenana, ahead of you where you could see him all the time?

A. Well, I think I could see him all the time. He was probably about a hundred and fifty yards ahead of me.

Q. Well, Mr. Hagan, was there anything unusual occurred around there that day from the time the mail was unloaded until it arrived at the postoffice, anything different than any other day?

A. No.

Mr. CRANE.—You may inquire.

Cross-examination.

(By Mr. CLARK.)

Q. You didn't see anything unusual in Nenana that day? A. No.

Mr. CLARK.—That's all.

(Testimony of James Hagan.)

Redirect Examination.

(By Mr. CRANE.)

Q. If there had been anything unusual you would have seen it, would you?

Mr. CLARK.—I object to that as not proper redirect examination.

The COURT.—Overruled.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

A. If there had been anything unusual I would have seen it, I think, especially around the mail.

Mr. CRANE.—That's all.

The COURT.—Just tell the jury how far it is, [158—129] Mr. Hagan, from where the train pulled in that morning and unloaded the mail to where the ferry-boat is on the side of the dock?

A. It is probably about as far as from here to that railing (indicating); not much more than that.

Q. Just short a distance?

A. Just a short distance. You could stand on the slip going down onto the boat and you could see everything that was around there all the time.

Mr. CRANE.—That's all.

Recross-examination.

(By Mr. CLARK.)

Q. How far is it from the dock on the Nenana side to the postoffice?

A. It's about three blocks.

Q. Well, was it then? Where was the post-office then? A. In the Bone block.

Q. And that is about how many blocks?

(Testimony of James Hagan.)

A. About three blocks.

Q. Were you particularly watching the mail that day? A. Oh, I just walked on up behind it.

Q. Well, were you particularly watching it? Did you have any reason for watching the mail?

A. No, nothing, just seen him taking the mail ahead of me, that's all.

Q. Did you have any reason for watching the mail on the North Nenana side?

A. I always made it a custom to go over for every mail.

Q. I am asking you, Mr. Hagan, if you had any particular reason for watching the mail? [159—130]

A. No particular reason for watching it.

Q. You didn't go over there that day particularly to see that mail, or to examine it, or to do anything of the kind, did you?

A. No, just the same as I went any other time any other train day.

Q. What you observed was the regular routine being followed that day?

A. I just simply always kind of keep a lookout on the mail, though.

Q. What?

A. An officer would naturally watch the mail.

Q. Did you naturally specially watch the mail that day?

A. Not any more than any other time.

Mr. CLARK.—That is all.

(Testimony of James Hagan.)

(By Mr. CRANE.)

Q. But you state that you did always watch the mail? A. Yes, sir.

Mr. CRANE.—That's all.

(Witness excused.)

(Recess.) [160—131]

TESTIMONY OF MRS. L. A. FAIRBURN, FOR PLAINTIFF.

MRS. L. A. FAIRBURN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. What is your name?

A. Mrs. L. A. Fairburn.

Q. Where do you reside, Mrs. Fairburn?

A. My home is in Fairbanks, but I am teaching school at present at McKinley Park.

Q. Where were you residing in September, 1921?

A. At Nenana.

Q. Mrs. Fairburn, were you employed in the postoffice at Nenana, Alaska, in September, 1921?

A. I was.

Q. Were you employed there on 16th of September, 1921? A. I was.

Q. What was your position at that time?

A. I was working as clerk.

Q. Mrs. Fairburn, do you remember of receiving the mail on that day from Mr. Ranstedt?

A. I do.

(Testimony of L. A. Fairburn.)

Q. And where did you receive it?

A. In the postoffice, right at the door, took it out of his hand.

Q. And how many sacks, if you remember, or pouches? A. There were two.

Q. What kind, if you remember?

A. One was what they call a pouch with a lock on it and the other was a sack that was tied. [161—132]

Q. And upon receiving this sack and pouch what did you do with them?

A. I put them on the distributing table.

Q. And who took charge of them there, if you know? A. Mr. Tunison.

Q. And what did he do with them, if you know?

A. He opened both the pouch and the sack. He unlocked the pouch and emptied the contents on the distributing table.

Q. Was it the locked pouch that contained the registers? A. Yes, it was.

Q. Did you see him empty out the registers?

A. I did.

Q. Do you know what he did with the registered packages of that day?

A. He picked up the registered package and, as I remember it, he looked at it, as one naturally would, and took it to Mrs. Williams' desk, which was just a very short distance from where we were standing, and handed it to Mrs. Williams with the remark, "Here is your registry."

(Testimony of L. A. Fairburn.)

Q. Then later on that day were you present when Mrs. Williams opened the jacket and took out the registered parcel that was addressed to Mr. Doner?

A. Yes, I was standing at the distributing table helping Mr. Tunison distributing the mail.

Q. What, if anything, was unusual about the registered parcel?

A. The first I recall was that Mrs. Williams said, "Mr. Tunison, will you come here?" and he went to her desk where she was attending to the registered mail, and I [162—133] heard them talking about the condition of this package, this registered package, and I didn't pay very close attention to what they were saying until I heard them say that there was something, that there must be something wrong with it. I heard them discussing it, what was the best to do with it, and I don't remember that I went and looked, but I know I turned and looked and noticed that they were examining the package carefully and discussing the condition in which the bag or the sack was in that contained this bag that was registered.

Q. What was the condition of that registered parcel, if you know, Mrs. Fairburn?

A. I didn't look at it just then, but later in the day I saw it, and I noticed that it had been either ripped open or burst open.

Q. Or could it have been cut open?

A. It could have been cut. It had been bended in some way and pinned together with a nail.

(Testimony of L. A. Fairburn.)

Q. And what did you next do? The next time you handled the package was when?

A. Was in the—later in the afternoon when Mr. Raeburn came to the window and asked for the mail for the Alaska Engineering Commission. I gave him the book to sign for the registered package and turned to the safe to get the package out of the safe, and Mr. Tunison was working in that corner of the room and it was rather crowded, and he opened the safe and handed me the package with the remark, "This package looks to be not in a very good condition, and it worries me, Mrs. Fairburn," he says. He made the remark that he thought [163—134] perhaps the girls in the postoffice at Fairbanks had been in a hurry when they fixed up the mail and perhaps they had dropped it and burst the package.

Q. What did you say, if anything?

Mr. CLARK.—We submit, if the Court please, that is incompetent and immaterial.

The COURT.—Objection sustained.

Q. Mrs. Fairburn, did you at that time call Mr. Raeburn's attention to the package when you delivered it to him? A. I did.

Q. And what did you say to him?

A. I said, "Mr. Raeburn, this package is badly damaged, and if you are not careful you will lose some of your money out of the end of it."

Mr. CRANE.—You may inquire.

(Testimony of L. A. Fairburn.)

Cross-examination.

(By Mr. CLARK.)

Q. What was the shape or condition of the package when you received it, or when you handed it to Mr. Raeburn, Mrs. Fairburn?

A. The shape?

Q. Yes, was it a flat package?

A. No, it wasn't flat. It seemed to have a roll in it. It seemed to have something in it that made it not exactly round, but more round than any other shape.

Q. Well, the sack over the top was kind of loose, was it?

A. Yes, it was rather loose, I would say.

Q. And whatever was inside could move back and forth, there was some space inside?

A. Yes, as I recall, there was some space. It wasn't [164—135] packed real tight.

Q. Did Mr. Raeburn open that package while in your presence? A. No, sir, he did not.

Q. He signed the return card, what is called the red return card, he signed that at your window, and also signed the registry book showing that he had receipted for the package, did he?

A. He signed the book. I don't recall whether he signed a card or not, but I knew he signed the book.

Q. I beg your pardon. I thought you said he signed a card also. But he then took it away from the postoffice without opening it, did he?

A. He didn't open it in the postoffice, Mr. Clark.

(Testimony of L. A. Fairburn.)

Q. Yes. And did you notice, did you examine carefully the bottom of the sack at the time you handed it out to him, or at any time after it was received in the postoffice?

A. I examined it when I had it in my hand previous to giving it to Mr. Raeburn, examined it very carefully.

Q. And you say it was fastened at the bottom with a nail?

A. It was fastened with a finishing nail. The nail was put through the ends.

Q. And it looked to you as though it had been ripped, or dropped, or had burst?

A. It had been opened in some way. It could have been ripped, or it could have been burst, or it could have been cut open.

Q. When you had it in your hand did you work it in any way, or notice that whatever was inside would move around [165—136] in the sack?

A. It would move, yes.

Q. How much of the space proportionately would you say, that is, the space inside of the sack, was taken up by the roll, or whatever was in there?

A. Well, I don't know, Mr. Clark, but, as I remember, there was—there might have been—my judgment might be at fault, but there might have been an inch space if the sack had been smoothed down and stretched out on each side. There might have been an inch on each side and there may have been more; I am positive about that.

Q. It was the ordinary coin sack?

(Testimony of L. A. Fairburn.)

A. Well, I am not very familiar with coin sacks, but I suppose it was. It was heavy muslin or heavy canvas sack.

Q. Did you shake it to see if there was any sound? A. I don't recall shaking.

Q. Well, had Mr. Raeburn, when he came for this package, did he say anything about it containing money?

A. I don't recall that he did. Of course, we all were under the impression that Mr. Raeburn was getting money, because he usually got money to pay off the men for the Commission.

Q. He represented Mr. Doner at Nenana?

A. He received the mail; he had charge of the mail for the Commission, Alaska Engineering Commission, at that time at Nenana.

Q. Do you remember about what time in the day the mail came into the postoffice? [166—137]

A. Well, I think it was after 2:00 o'clock, some time between 2:00 and 3:00, and it would seem to me that it must have been about half past 2:00, or about that time. It was late, I know.

Q. And do you remember about the time it was when Mrs. Williams opened up this registered package and had this discussion with Mr. Tunison?

A. She opened it immediately after Mr. Tunison put the contents of the locked pouch on the distributing-table. He handed the package, as I said before, to Mrs. Williams and she opened it very soon after that, in just a few minutes, I would say.

(Testimony of L. A. Fairburn.)

Q. Then do you remember about what time in the day it was that Mr. Raeburn came for the mail?

A. He came some time before 5:00. I think just a few minutes before 5:00 o'clock.

Q. So it was something, probably an hour and a half or two hours from the time the mail arrived in the postoffice before Mr. Raeburn came to get the package? A. Yes, it was.

Mr. CLARK.—That is all.

(Witness excused.) [167—138]

TESTIMONY OF B. TUNISON, FOR PLAINTIFF.

B. TUNISON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. Where do you reside, Mr. Tunison?

A. Nenana.

Q. And where did you reside during September of 1921? A. At Nenana.

Q. And where were you employed in September, 1921? A. Postoffice.

Q. Mr. Tunison, were you employed in the postoffice on the 16th of September, 1921? A. Yes.

Q. And what were your duties? A. Clerk.

Q. Do you remember on the 16th of September, 1921, of being in the postoffice when the mail was received? A. I do.

(Testimony of B. Tunison.)

Q. Did Mrs. Fairburn on that day hand you or place on the table for you a pouch and sack?

A. She did.

Q. I will ask you, Mr. Tunison, if you unlocked the locked pouch of that date? A. I did.

Q. I will ask you if when it was received at the postoffice at Nenana it was securely locked?

A. It was.

Q. And how did you unlock it?

A. With the key attached to a chain in the postoffice. [168—129]

Q. Do you remember what kind of a key it was?

A. One of the new locks, an L. A. lock.

Q. I hand you Plaintiff's Exhibit "E" for identification and ask you if that is the kind of a sack and lock that you received that day?

A. Yes, sir.

Q. I will ask you to look at the tag on the inside of it and read it and tell me what it is?

A. "Fairbanks, Alaska, September 16, 7:00 A. M., clerk No. 1."

Q. Are there any other stamps on there?

A. There is a weight on there, 12 pounds. That seems to be the only stamp that is on there.

The COURT.—Speak a little louder, Mr. Tunison.

A. (Repeating.) That is the only stamp there is on there.

Q. Mr. Tunison, did you open this pouch on that day, you say? A. I did.

(Testimony of R. Tunison.)

Q. What did you do with the registers that were in it?

A. After emptying the sack I placed them on Mrs. Williams' desk.

Q. How many registers were there in that sack that day? A. Two.

Q. Was there, if you remember, one addressed to Frank Deaver? A. There was.

Q. Did you place them on Mrs. Williams' desk?

A. They were in the jacket. I placed the jacket on Mrs. Williams' desk.

Q. Mr. Tunison, were you present when Mrs. Williams opened that jacket? [169—140]

A. I was.

Q. At the time that she opened the jacket was your attention called to anything? A. It was.

Q. What was it?

A. Well, there was one letter that I think was from Cleary, was a bill from Fairbanks, and the package looked to be in a damaged condition, but didn't pick it up at that time because I was very busy.

Q. When did you pick it up?

A. Well, I didn't pick it up till, I think, it was nearly the time it was delivered to Mr. Rasburn that I had it in my hands.

Q. Did you examine it then? A. I did.

Q. And from examining it what did you find the condition of it to be, especially the bottom of the sack?

(Testimony of R. Tunison.)

A. Well, it was in a damaged condition. There was little ravelings out at the edge, and there was a finishing nail it had been sown together with.

Q. What kind of a nail?

A. A finishing nail.

Q. Were you in the postoffice when the registered package was delivered to Mr. Raeburn?

A. I was.

Q. Now, passing from that, when you afterwards delivered it to Mr. Raeburn, when did you next come in contact with this package, or when was it next called to your attention?

A. Well, I think it was about 7:00 o'clock. I am not [170—141] certain of the exact time.

Q. Where? A. At Mr. Raeburn's office.

Q. And how did you happen to be at Mr. Raeburn's office?

A. I went there as we was finding out—we had been in communication by telephone to find out if we could get any data how much was in the pouch, in the sack, so we could examine it.

Q. You went there for the purpose of examining it, did you? A. I did.

Q. Now at the time you were in Mr. Raeburn's office was this package opened?

A. The time when I went there? No, it wasn't.

Q. Well, at the time you went to Mr. Raeburn's office who was there?

A. Mr. Raeburn was there.

(Testimony of B. Tunison.)

Q. And did anyone else come shortly after you arrived? A. Yes, they did.

Q. Who was that? A. Mrs. Williams.

Q. After Mrs. Williams arrived what did you and Mr. Raeburn and Mrs. Williams do, if anything, with reference to this package?

A. Mr. Raeburn went to the safe and took the package out and we examined it.

Q. Prior to that do I understand you to say that Mrs. Williams had opened the jacket in the postoffice and just the package was delivered to Mr. Raeburn?

A. The package. There was a small letter in with the package in the jacket. [171—142]

Q. And where was the jacket left, in the postoffice? A. Yes, sir.

Q. Now this package that was delivered to Mr. Raeburn, when it was opened in the presence of yourself, Mrs. Williams and Mr. Raeburn I will ask you what you found the contents of the package to be?

Mr. ROTH.—We object to the question on the ground the same is irrelevant, incompetent and immaterial; a proper foundation has not been laid for the introduction of the testimony in that it doesn't appear that is the first time the package was opened after it left the postoffice. Mr. Raeburn is the only one, I suppose, that would know that. But the proper foundation has not been laid now for the introduction of the testimony.

(Testimony of B. Tunison.)

The COURT.—Objection overruled.

Mr. ROTH.—Exception.

The COURT.—Exception allowed.

A. There was a package in there wrapped in a brown paper tied with string, that was the magazine, and there was some silver. I wouldn't say what the amount of silver was.

Q. I will get to that in a minute. Handing you Plaintiff's Exhibit "A," I will ask you if this is the sack that was opened in Mr. Raeburn's office in the presence of yourself and Mrs. Williams?

A. It is, yes, sir.

Q. What kind of a magazine?

A. It was a "Popular Mechanics."

Q. How was it wrapped?

A. Rolled, tied with a string and paper. [172—143]

Q. I hand you Plaintiff's Exhibit "G" for Identification and ask you if this is a similar magazine to the one that was found in that sack that night?

A. It is. The magazine had no cover on it. Of course I didn't pay particular attention about what date or issue it was.

Q. Just show me how that magazine was folded.

A. (Illustrating.) About like that.

Mr. ROTH.—Let's see. I want to see that. All right.

Q. How was it wrapped?

A. Brown paper, tied with postoffice string.

Mr. CLARK.—We ask that last part be stricken out as a conclusion. If they have a string they can

(Testimony of B. Tunison.)

introduce it in evidence. He is testifying now, giving a conclusion as to what it was tied with.

The COURT.—Objection overruled.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

Q. Mr. Tunison, I hand you Plaintiff's Exhibit "H" for Identification and ask you if that is a similar nail to the one that was in the bottom of the canvas bag? A. It is.

Q. I hand you Plaintiff's Exhibit "F" for Identification and ask you if this is the color and similar paper that was around the Popular Mechanics magazine? A. Yes, sir.

Q. Did you open the coin sack or just take the sack as a whole out, the little coin bag that was in there?

A. No, we just took the nail out of the sack.

Q. No, I mean the coin sack that was inside of the [173—144] package; did you open that or just take it out?

A. I don't remember about that. It was opened there, but I don't remember it.

The COURT.—Did you see it?

A. Yes, sir, I saw it.

Q. The sack containing the silver, I mean?

A. Yes, sir, I saw it.

Q. Was there a paper or a letter or anything else in there, if you remember? A. Yes, sir.

Q. I hand you Plaintiff's Exhibit "I" for Identification and ask you if that is the same as was in the sack or in the parcel when you opened it?

(Testimony of B. Tunison.)

A. Yes, sir.

Q. Mr. Tunison, I hand you Plaintiff's Exhibit "J" for Identification and ask you if that is the size of the coin sack you took out of that package that night? A. It is, yes, sir.

Q. Now, Mr. Tunison, what was done with the coin sack, the bill, nail, magazine, and the paper that the magazine was wrapped in after you opened the package and found the contents to be such?

A. Returned to the postoffice and placed in the safe.

Q. The postoffice at Nenana? A. Yes, sir.

Q. Do you know who they were delivered to after they were locked up in the safe?

A. Delivered to Mr. Wetzler.

Q. And when were they delivered to Mr. Wetzler, if you know? [174—145]

A. Well, I think it was the next afternoon. I couldn't say the time, though.

Q. I will ask you, did you see Mrs. Williams open the jacket?

The COURT.—Referring now to the postoffice?

Q. In the postoffice, referring to the jacket now?

A. No, I couldn't say that I did. I was busy.

Q. Do you know of your own knowledge whether or not the jacket was sealed or tied with a string?

A. It was not sealed.

Q. It was not sealed? A. No.

Mr. CRANE.—You may inquire.

(Testimony of B. Tunison.)

Cross-examination.

(By Mr. CLARK.)

Q. Mr. Tunison, can you show us just how this magazine was put in this sack and fastened when you saw it down there?

A. Let's see, this was in a paper.

Q. All right, we will get the paper (handing paper to witness). Just fix it up as near as you can the way it was that day.

A. (Illustrating.)

Mr. ROTH.—You ought to have a string now so you can tie that.

Mr. CLARK.—Have you the string?

Mr. CRANE.—Mr. Neil will get it. (Mr. Neil produces a string.)

Q. Now will you put it in the sack in about the same position it was at that time? [175—146]

Mr. CRANE.—Have him put the coin sack in also, Mr. Clark.

Mr. CLARK.—I will.

Q. Now where was the coin sack?

A. The coin sack was on one side up on top here (indicating).

Mr. ROTH.—Well, put that in. Here is your nail.

Q. There is the nail taken from Identification "H."

A. (Witness places contents suggested in sack and fastens sack with nail.) It was so there was just a little ravelings showed.

The COURT.—Well, it is frayed there now.

(Testimony of B. Tunison.)

Mr. CLARK.—Yes, it is frayed.

Q. That will be all right, Mr. Tunison. As that package is now with that in there was about approximately the appearance of the package when you took it out? A. Yes.

Q. That is, the coin sack was in alongside of this rolled magazine up near the upper end?

A. Yes, sir.

Q. And the rest of it, it was fastened here at the lower end that is now frayed, was fastened by this finishing nail being run through?

A. It was.

Q. And that was inside of the container?

A. When it came to the postoffice it was inside of a paper jacket.

Q. You didn't have any trouble getting it out of the jacket, did you?

A. Mrs. Williams took it out of the jacket.

Q. You are not the one who actually took it out of the jacket? [176—147] A. No.

Q. But the sack was no more full than is indicated there when it was received in the postoffice?

A. No, it was not. And this that is raveled out there was plain and the ravel didn't show.

Q. And where was the nail as regards the bottom here? Was it about the center or towards—

A. (Interrupting.) Just about the center, as near as I can remember.

Q. Now how long after that came into the postoffice, the package came into the postoffice and was

(Testimony of B. Tunison.)

taken out of the container, or taken out of the mail sack and placed on Mrs. Williams' desk, was it before it was examined?

A. Well, it was a very few minutes. I wouldn't say exactly how many minutes. I was busy making up mail for lower river at the time it came in, so I wouldn't say how many minutes it was, but a very few minutes.

Q. Then it was put in the safe after it was examined? A. It was.

Q. And then was delivered to Mr. Raeburn when he came for it? A. It was.

Q. And then when you went over that evening to Mr. Raeburn's office was when it was opened up?

A. Yes, sir.

Q. I suppose this letter from Mr. Hutchinson was put in the package some place?

A. Right inside of the magazine.

Q. Inside of the magazine?

A. No, tucked on the outside. [177—148]

Mr. CRANE.—There is the envelope, Mr. Tunison (handing envelope to witness).

A. (Continuing.) On the outside, just laid in there.

Q. Just stuck around the (illustrating)—

A. (Interrupting.) That is it.

Q. Around the magazine? A. Yes, sir.

Q. So that is virtually the condition of the package as you received it other than it can't be fastened now with the nail? A. Yes, sir.

Q. The sack that you opened—this is probably

(Testimony of B. Tunison.)

the sack that came down there that day (indicating)?

A. I know it came very close to be a loose sack.

Q. And you would judge from the notations on this piece of paper that is contained in the address tag that this is the same package that came in that day? A. I would; yes.

Q. Now how long have you worked around post-offices, Mr. Tunison? A. About eleven years.

Q. You are familiar with these locks?

A. Yes, sir.

Q. Every postmaster has a key, haven't they?

A. Yes, sir.

Q. They generally have them on a chain or something around the work-table?

A. On a chain fastened to the work-table, yes, sir.

Q. And when they want to open a sack they just unloose it and let the key stay there?

A. The key is always fastened so they always know where [178—149] the key is.

Q. It is fastened there on a chain or something of that kind? A. Yes, sir.

Q. And the keys are never put in the safe, are they? A. No.

Q. The key to unlock the lock?

A. No, not for the ordinary locks are not put in the safe.

Q. So there were only three pieces in that registered pouch. There was the two contained—

Mr. CRANE.—(Interrupting.) Two registered, Mr. Clark.

(Testimony of B. Tunison.)

Q. There were two pieces of registered mail in the container? A. Yes.

Q. And was there one letter separate from that?

A. No, the letter was in this jacket, in this paper jacket. The letter was in this (indicating) with this package from the bank.

Q. So the only registered mail which went to Nenana in that sack was what was contained inside of the container that you have just testified to?

A. Yes, sir.

Mr. CLARK.—That's all.

Redirect Examination.

(By Mr. CRANE.)

Q. Mr. Tunison, about that registered letter that was in there, where was that addressed to, you say?

A. I think it was to Nenana. I wouldn't say for certain. [179—150]

Q. You remember where it was from?

A. It was from Cleary, I think.

Q. From Cleary and addressed to Nenana?

A. It was mailed from Fairbanks.

Q. How did it appear on the bill?

A. It showed on the bill it was just billed from Fairbanks; didn't show where it was made up from.

Mr. CRANE.—That's all, Mr. Tunison.

(Witness excused.)

Whereupon an adjournment was taken until 2:15 o'clock P. M. [180—151]

AFTERNOON SESSION.

Wednesday, February 18, 1925, 2:15 P. M.

TESTIMONY OF MRS. L. WILLIAMS, FOR PLAINTIFF.

MRS. L. WILLIAMS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. What is you name, please?

A. Mrs. L. Williams.

Q. And where do you now reside?

A. Anchorage.

Q. Where were you residing in September, 1921, Mrs. Williams? A. In Nenana.

Q. Were you acting postmaster during the month of September, 1921? A. Yes.

Q. And were you in the postoffice on the 16th of September, 1921? A. Yes, sir.

Q. At Nenana, Alaska? A. Nenana, yes, sir.

Q. Do you remember, Mrs. Williams, of Mr. Ranstedt delivering the mail to the postoffice on that day? A. Yes, sir.

Q. And after the mail pouch and sack was received at the postoffice and opened, unlocked and opened, when did you first see the registered articles?

A. Well, right away, as soon as Mr. Tunison took them out of the sack and brought them and laid them on the table [181—152] beside me.

(Testimony of Mrs. L. Williams.)

Q. What did that consist of, how many parcels, if you remember? A. Just one, one parcel.

Q. And did you open it? A. Yes, sir.

Q. I will ask you, Mrs. Williams, if the registered parcels referred to were enclosed in this registered jacket marked Plaintiff's Exhibit "C" (handing jacket to witness)?

A. Yes, sir, one like it. I think that was the one.

Q. Examine it and see if that is the one.

A. Yes, sir, I think this is the one.

Q. Mrs. Williams, when you received this registered jacket was the contents inside of this?

A. Yes, sir.

Q. State whether or not this jacket was sealed or tied? A. It was tied.

Q. And did you untie it and unwrap it yourself?

A. Yes, sir.

Q. When you untied it and unwrapped it and took out the parcel was there a sack in there addressed to Frank Doner? A. Yes, sir.

Q. And what, if anything, did you notice about that sack addressed to Mr. Doner?

A. I noticed that it was damaged at the end.

Q. I hand you Plaintiff's Exhibit "A" and ask you if that is the sack that you took out of the jacket that day? A. Yes, sir.

Q. What was your answer? A. Yes, sir. [182—153]

Q. Now just state to the jury the condition of the

(Testimony of Mrs. L. Williams.)

bottom end of this canvas bag when you first noticed it in the postoffice at Nenana?

A. Well, it was all tucked in very nicely. Of course it didn't seem to be open and sprung as bad as this; it was a very nice job. It was done up very tight and very smooth here (indicating), and it had the books in, and at this corner there was—it laid there—I know the top was—the address was on the top and it laid here (indicating), and this end was in very nice. Well, it was all—just at this corner there was a few ravellings hung out over here. When I first noticed it it looked like it fell or had a jar and kind of broken here at the end.

Q. And how was that end fastened, Mrs. Williams?

A. It was fastened—the whole thing—this was turned in under here (indicating) tight, very tight; it was just as tight, as I say, and there was a nail in here.

Q. What kind of a nail, if you remember?

A. A finishing nail.

Q. Now, Mrs. Williams, after examining that package did you make any note of it on anything?

A. Yes, sir, I spoke to Mr. Tunison. I went over, as soon as I discovered there was something wrong, both the letter was wrong and that package, I called Tunison over and he stood and looked at it and he said, "Now be sure and make a note of it," and I did, I made a note right on the bill. Mr. Tunison, of course, was really watching the work.

(Testimony of Mrs. L. Williams.)

Q. I will show you Plaintiff's Exhibit "B" for Identification, which is a registry bill, and ask you if the writing [183—154] on the bottom of the bill is your handwriting?

A. Yes, sir, that is my writing.

Q. And did you put that writing on there on the 16th of September, 1921, at Nenana, Alaska.

A. Yes, sir.

Mr. CRANE.—If the Court please, I now ask that Plaintiff's Identification "B" be marked and admitted into evidence.

The COURT.—Any objection?

Mr. ROTH.—No objection.

The COURT.—It may be admitted and properly marked.

(Paper referred to received in evidence, marked Plaintiff's Exhibit "B" and made a part of the record herein.)

(Exhibit "B" read to the jury.)

Q. Mrs. Williams, were you present in the post-office when this package was delivered to Mr. Raeburn? A. Yes, sir.

Q. And you know whether or not his attention was called to the damaged condition?

A. Yes, sir, it was.

Q. And later in the day, Mrs. Williams, did you go to Mr. Raeburn's office?

A. Yes, sir, that evening.

Q. Prior to going to Mr. Raeburn's office that evening, and during the day while you were in

(Testimony of Mrs. L. Williams.)

Nenana, state whether or not you called Postmaster Deal at Fairbanks? A. Yes, sir, we did.

Q. And what did you call him for?

A. Well, after Mr. Raeburn had taken the package away and we had discovered—we had examined it at the window, we came back into the office, Mr. Tunison says, "I [184—155] think you better call up Mr. Deal and notify him and tell him about that package," so I called up central and she got Mr. Deal on the phone.

Q. And what did Mr. Deal tell you to do, or what did he say?

A. Mr. Deal told me—well, of course it surprised Mr. Deal and seemed to worry him. He spoke and said as much as to infer that I should have notified him—"Why didn't you notify this office before," that "you received it about 12:00 o'clock, you received that package at 12:00 o'clock and you should have notified us before." And then he says, "And it should never have been delivered, you should never have delivered it to Mr. Raeburn, you should have counted it before it left here."

Q. You say he said, "You should have counted it before it left here"?

A. Before it left here.

Q. Do you know what he meant when he said count it?

A. Yes, sir, of course I realized that Mr. Deal knew, and I knew, we all knew, that that was—that it was money from the bank and going to Mr. Doner. We all knew it was money.

(Testimony of Mrs. L. Williams.)

Q. Now, Mrs. Williams, when you went to Mr. Raeburn's office that evening who was at Mr. Raeburn's office? A. Mr. Tunison.

Q. And who else? A. And Mr. Raeburn.

Q. And at Mr. Raeburn's office you may state whether or not you and Mr. Raeburn and Mr. Tunison opened this registered package. [185—156]

A. Yes, sir, Mr. Tunison—they were there talking at the desk when I went in, and Mr. Raeburn went to the safe and got the package and brought it out and the two men—I don't know now which one of them, but the two—it was the men that opened it. I stood right there, we were all three there together, and they opened the package.

Q. What did you find the package contained upon the opening of it?

A. Well, it contained a package of brown paper, bundle, a little bundle came out, and a little sack with silver in it, and an invoice or a letter telling us what was in there.

Q. And what was wrapped up in the brown paper? A. A magazine.

Q. Do you remember what kind of a magazine?

A. Yes, sir. It was a Popular Mechanic.

Q. I hand you Plaintiff's Exhibit "G" for Identification and ask you if that is the same or a similar magazine to the one that was in that package?

A. Yes, this is a similar one, because it had no cover on it just like that.

(Testimony of Mrs. L. Williams.)

Q. Handing you Plaintiff's Exhibit "F" I will ask you if this is the same kind of paper that was around that magazine?

A. Yes, sir, this is the same kind of paper.

Q. I hand you a bill and envelope marked Plaintiff's Exhibit "I" for Identification and ask you if those were also found in the sack?

A. Now the envelope I don't—but this is the bill, because I remember of taking it and reading it. [186—157]

Q. And is this nail, Plaintiff's Identification "H," a similar nail to the one found in the sack?

A. Yes, sir, it was a nail without a head and like that.

Q. Handing you Plaintiff's Identification "J," which is a coin bag, I will ask you if this is the same or a similar bag to the one taken out of the the canvas package that evening?

A. Yes, sir, it was similar to that. It was like that; it was a little coin bag like that.

Q. After the package was opened what was then done with the coin sack, brown paper, magazine, nail and invoice that was in it?

A. Mr. Tunison and I went back to the postoffice and put it into our safe at the postoffice.

Q. Did you take it all back to the postoffice with you?

A. Took it all back to the postoffice and put it in the safe.

Q. And who, if anybody, did you later turn it over to?

(Testimony of Mrs. L. Williams.)

A. Well, next day we turned it over to Mr. Wetzler.

Q. Was it in the safe and locked up until the time you turned it over to Mr. Wetzler?

A. Yes, in the morning, early in the morning before the postoffice opened, Mr. Raeburn and Jim Hagan came to my door, and the postoffice wasn't open yet, so we waited a few minutes in my living room until we heard Mr. Tunison come in the front part, then we went into the postoffice and we showed Jim the exhibit, the sack and the paper, and then it was put back into the safe until Mr. Wetzler came in the afternoon, I think. He came on a speeder.

Q. And what did you do with the mail pouch that you [187—158] received at the postoffice that day? Did you turn that over to anybody?

A. Yes, sir, that was put in—it all was given to Mr. Wetzler; he took care of it all.

Q. And that is the same pouch that had the registered packages in it, is it? A. Yes, sir.

Mr. CRANE.—That was turned over to Mr. Wetzler. You may inquire.

Cross-examination.

(By Mr. CLARK.)

Q. Mrs. Williams, when you called up Mr. Deal you told him that a registered package of money from the bank addressed to Mr. Doner had appar-

(Testimony of Mrs. L. Williams.)

ently been tampered with and was in bad condition, didn't you.

A. I think so, yes, sir. Told him it was in bad condition.

Q. You identified it by telling him it was a package of money sent by the bank, didn't you?

Q. By the bank, certainly.

Q. Then he told you that you should have counted it before it left the postoffice?

A. Yes, sir, before it was delivered—before it left the postoffice we should have counted it.

Q. You didn't notify Mr. Deal about this until after it had been delivered to Mr. Raeburn, did you?

A. Mr. Raeburn, yes, sir. Right away after—right away after we delivered it to Mr. Raeburn I went right in and then called up Mr. Deal.

Q. But you knew earlier in the day, of course, that the package had been rifled or something had happened to [188—159] the package?

A. Yes, sir.

Q. Now when the package, this container, was laid on your desk by Mr. Tunison you unwrapped the string from around it, did you?

A. Yes, sir, I untied it.

Q. Was it tied up securely? A. Yes, sir.

Q. How many wrappings of string around it?

A. Oh, I couldn't swear to that. It was quite a long string on it that it was wrapped with.

Q. Then did you look into the package before

(Testimony of Mrs. L. Williams.)

you took these things over or just turn the package over and dump them out?

A. I just took them out just as we always do. I was sitting right at my desk.

Q. No trouble in taking the package out?

A. I don't think so.

Q. And the coin, this small coin sack was in the package with this rolled-up magazine?

A. The silver money?

Q. Yes. A. Yes, sir.

Q. That was in there. And then the magazine was in, and it was stuck in lengthwise, was it, or the sack? A. Yes, sir.

Q. And the ends tucked in and fastened with a nail? A. Yes, sir.

Q. This container, this paper jacket that has been shown to you, that is the same jacket—this is the same jacket that this money came in that is marked [189—160] Plaintiff's Exhibit "C"? That is the jacket, is it (showing jacket to witness)? A. Yes, sir.

Q. Is it in the same condition now as it was when you took the package out of it?

A. Yes, sir.

Q. And you immediately turned it over?

A. Immediately turned it over.

Q. And did you notice the corner torn at that time? A. I don't remember.

Q. Did you notice this tear in the middle of the flap?

(Testimony of Mrs. L. Williams.)

Q. No, I wasn't examining the jacket at all. I was—

Q. (Interrupting.) But you turned it over just as you got it to Mr. Wetzler?

A. Just as I got it to Mr. Wetzler, I turned it over to him.

Q. And you reached right in the package and took out the package. A. Yes, sir.

Q. You didn't tear this, did you, Mrs. Williams?

A. Well now, not that I know of, Mr. Clark. I wouldn't swear to it that I didn't. Not that I know of.

Q. But you have no recollection of finding it necessary to tear it to take the package out?

A. I have no recollection of it, no. It might have torn a little as I took it out by being in tight. Now I don't remember that, whether it fit in tight or not.

Q. You don't remember that? A. No.

Q. But you don't remember having any difficulty taking the package out? [190—161]

A. No, I remember it was just rolled in there and tied in there.

Q. What was the shape of the package when you got it? A. This package (indicating)?

Q. Yes. Just indicate. Was it flat like that, that is, was it flat like this (indicating) or was it rolled up?

A. No, I think it was rather—I wouldn't swear to that, but it was rolled—it was tied with a string.

(Testimony of Mrs. L. Williams.)

Of course with that coin sack in naturally it would bulge out, and it was just tied around with a string.

Q. Yes, but what I am trying to get at is this. Was it flat like this (indicating) or was it rolled up and tied?

A. Oh, I wouldn't swear to that?

Q. You don't remember that? A. No.

Q. And you think that this is the sack that this was in? A. Yes, sir.

Q. Did you notice whether it was torn—

A. (Interrupting.) Yes, I noticed it was a ragged little sack. I noticed that night it was a ragged little sack.

Q. And the paper that it was wrapped up in, was it paper with a hole torn in it at that time? This paper that you have identified as being similar to the paper that was around the magazine, was it torn that way when you got it, when you unwrapped the magazine?

A. Well now, I wouldn't swear to that. It was brown paper like that. I wouldn't swear to it, but if that is the exhibit that Mr. Wetzler got as we handed it to him it was most likely. [191—162]

Q. And the magazine that was in there was a magazine without any cover on?

A. Without any cover on.

Q. And did you notice at that time that it was somewhat soiled?

A. I remember taking it in my hand and looking at it and remember that it was a July number and that it was an old one. I remember plainly

(Testimony of Mrs. L. Williams.)

that night as the men stood there I took this in my hand, I remember taking it, and it was an old magazine, and looking at it, and it was a July magazine.

Q. And showing it evidently had been handled?

A. Yes, been handled, yes, I noticed that.

Q. And you gave it to Mr. Raeburn about in the neighborhood of about 5:00 o'clock in the evening?

A. Yes, just a little bit before 5:00.

Q. Then you went over to his office about 7:00, was it, that you said, in the evening?

A. No, Mr.—Mr. Tunison—well, it might have been along about there, because Mr. Tunison went to dinner, or 6:00.

Q. The next you saw of it was in Mr. Raeburn's office? A. In Mr. Raeburn's office.

Q. Then you and Mr. Tunison took it back to the postoffice and put it in the safe?

A. Put it in the safe.

Q. And then delivered it personally to Mr. Wetzler the next afternoon? A. The next afternoon.

Q. And the only other time it was taken out of the safe was when Mr. Hagan came there with Mr. Raeburn the next [192—163] morning?

A. The next morning.

Q. When you took there articles back and put them in the safe were they put back in the container? A. I think so.

Q. You don't recollect exactly?

A. I am pretty certain they were, because our

(Testimony of Mrs. L. Williams.)

safe was crowded and I am almost certain they were, they were put back in the container.

Q. Was the magazine put back in the canvas sack? A. I think so.

Q. And the coin put back in there?

A. I wouldn't swear to the coin, but the—

Q. (Interrupting.) Did you fasten it up with the nail again? A. No, sir.

Q. When Mr. Raeburn took it out of the safe when you went down there was the package in the same condition *was* it was when you gave it to him at the postoffice? A. Yes, sir.

Q. You could see no difference in the appearance of the package? A. No, sir.

Mr. CLARK.—I think that's all.

Redirect Examination.

(By Mr. CRANE.)

Q. When you say old magazine, Mrs. Williams, you mean old issue magazine?

A. Yes, I mean it wasn't just that month, it wasn't a September one, as we call the new magazine.

Mr. CRANE.—That's all. [193—164]

Recross-examination.

(By Mr. CLARK.)

Q. But, so far as you can remember, it was about in the same condition that it is at the present time?

A. Just about, yes, sir.

Mr. CLARK.—That's all.

(Witness excused.)

TESTIMONY OF W. B. RAEBURN, FOR PLAINTIFF.

W. B. RAEBURN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. What is your name? A. W. B. Raeburn.

Q. Where do you reside, Mr. Raeburn?

A. My home is San Fernando, California.

Q. Where did you reside during 1921, the fall of 1921? A. Nenana.

Q. Were you in Nenana the 16th of September, 1921, Mr. Raeburn? A. Yes, sir.

Q. And what were you doing at that time?

A. I was in charge of the river transportation. I was ticket agent, bond agent, and took care of the Commission mail for the Commission men.

Q. Mr. Raeburn, do you remember on the 16th of September, [194—165] 1921, whether or not you were over to North Nenana when the train came in on that day? A. Yes, sir.

Q. Do you remember of seeing Mr. Ranstedt take the mail after it was brought across on the ferry and carry it up to the postoffice?

A. I saw him with it on his shoulders.

Q. Mr. Raeburn, did you go to the postoffice later that day and call for the Commission mail and any packages or mail for Mr. Doner? A. I did.

(Testimony of W. B. Raeburn.)

Q. And what did you receive, if anything, for Mr. Doner? A. I received a package.

Q. Did you have authority to sign for registered packages for Mr. Doner, the disbursing agent?

A. Yes, sir.

Q. And did you receive a package for him on that day? A. I did.

Q. Addressed to him?

The COURT.—A registered package, was it?

A. Yes, sir, a registered package.

Q. And at the time you received this registered package for Mr. Doner was your attention called to anything unusual about it as you received it at the postoffice?

A. I don't remember whether it was or not.

Q. At the time you received it at the postoffice did you notice anything unusual about it? A. I did.

Q. State what it was.

A. The bottom of the bag was in bad condition. It looked like the corner sticking out of a little hole probably [195—166] an inch and a half long, and as soon as I took it in my hand I says, "This is in bad condition." Then I took the sack by the bottom and shook that little coin sack down to the top end of it, placed it under my coat underneath my arm, went to my office with it.

Q. And when you got to your office what did you do with the registered package?

A. I placed it in the safe.

Q. Did you lock the safe? A. Yes, sir.

(Testimony of W. B. Raeburn.)

Q. Then what did you next do with reference to this package?

A. The next I did was—no, I didn't put it in the safe right away. I laid it on my desk and tried to pin it together with an Acme stapler.

Q. And then after you put it in the safe what did you do with reference to it?

A. I went to my supper then after I put it in the safe.

Q. State if you remember whether or not you notified Mr. Doner?

A. I put in a call for Mr. Doner.

Q. And what was your purpose in doing that?

A. I wanted to get authority to open this because it was received in bad condition.

Q. Now later on in that day in your office I will ask if you, in the presence of others, opened that package?

A. It was opened in the presence of Mrs. Williams and Mr. Tunison.

Q. That was in the evening, was it? A. Yes.

Q. And when you opened this package state what you found [196—167] the contents to be?

A. The contents was a brown paper package, which we opened and found to be a magazine, a Popular Mechanics. I believe it was the July number.

Q. I hand you Plaintiff's Exhibit "G" for Identification and Plaintiff's Identification "F" and ask

(Testimony of W. B. Raeburn.)

you if this is the paper and magazine it contained, or similar ones?

A. That looks like the paper, looks like the same quality of paper, and that looks like the same magazine, although it shows more handling now than at that time it was received.

Q. You say it shows more handling now than at that time? A. Yes.

Q. Just fold it up and show me how that was in there, Mr. Raeburn?

A. It was more of a flat than it was a roll, placed more in that shape (illustrating), as I remember it, and wrapped with several turns of twine.

Q. And inside of the canvas sack, was it?

A. Yes.

Q. Now, Mr. Raeburn, where was the coin sack?

A. The coin sack was inside of the canvas sack.

Q. This Plaintiff's Identification "J," is that the coin sack? A. That looks like the one.

Q. Did you examine the nail and the bill that was in there? A. Yes, sir.

Q. I hand you Plaintiff's Identification "H" and ask you if that is a similar nail to the one that was in the sack?

A. Yes, sir, that is a similar nail to the one that was [197—168] in there.

Q. I also hand you Plaintiff's Identification "I" and ask you if that is the bill that was inside of the sack, that was inside of the package, rather?

A. I think that is the same one.

Q. Now, Mr. Raeburn, were all these articles con-

(Testimony of W. B. Raeburn.)

tained in this canvas sack which is Plaintiff's Exhibit "A"?

A. I believe that to be the same sack, or one just like it at least.

Q. And just show to me briefly now how that sack was closed when you received it, on the end?

A. Well, as near as I can remember it was folded over slightly and pinned with that nail. I don't remember exactly how it was folded, but anyway it was folded over and pinned up, and one end of it was a little more open than the other. The pin wasn't quite in the middle of it.

Q. Mr. Raeburn, what did you do with this canvas sack and the contents of it after you found out what they were that evening?

A. Why, Mrs. Williams took them away with her. She and Mr. Tunison left together.

Q. Now, Mr. Raeburn, had you been in the habit of receiving registered packages through the mail containing large amounts of currency for quite a period of time? A. Yes, sir.

Mr. ROTH.—I object to that as incompetent, irrelevant and immaterial.

The COURT.—I think it ought to be confined to the source from which it came.

Mr. CRANE.—I will change that. [198—169]

Q. Had you been in the habit of receiving packages containing currency shipped from the First National Bank at Fairbanks by registered mail to Frank Doner, disbursing agent of the Alaska Engineering Commission at Healy, Alaska?

(Testimony of W. B. Raeburn.)

Mr. ROTH.—We object to that on the ground the same is irrelevant, incompetent and immaterial, and that it cannot have any tendency to prove any fact or issue in this case, that it is not competent to prove any fact, and it is not relevant to any of the material allegations in the complaint at issue in this action.

The COURT.—You mean through the postoffice?

Mr. CRANE.—Yes, sir, by registered mail through the postoffice.

The COURT.—The objection will be overruled.

Mr. ROTH.—Exception.

The COURT.—Exception allowed.

A. Yes, sir.

Mr. CRANE.—You may inquire.

Cross-examination.

(By Mr. CLARK.)

Q. Mr. Raeburn, I believe you have stated that this magazine, when you found it, when you unwrapped it, was folded more flat than round?

A. Yes, sir.

Q. So instead of it being all rolled up it was flat something like that (indicating)?

A. Yes, sir, more of a flat package.

Q. And how many wrappings were around it? [199—170]

A. I don't remember the number of wrappings, but it was probably a yard of string. Several wrappings.

Q. When you took it to your office after examining it, or after noticing that there was something

(Testimony of W. B. Raeburn.)

the matter with it, what did you say about attempting to close the fold at one corner?

A. I attempted to close the hole at the corner with one of these little Acme staple machines.

Q. Well, could you see by looking at it that it had been cut along the full length of the bottom?

A. Yes, sir.

Q. And you think that the edges of the sack were turned over and then the nail used as a fastener, do you? A. Slightly turned over, yes, sir.

Q. And you immediately called up Mr. Doner and asked for permission to open it? A. Yes.

Q. At the time you got it from the postoffice did you have any conversation with Mrs. Williams in regard to what was contained in that sack?

A. No. It was understood what was in it.

Q. The postoffice there knew you had been accustomed to getting money, I believe you testified?

A. Yes, sir.

Q. And they would know what was in the package? A. Yes, sir.

Q. You were down at the dock when the mail came across on the ferry, were you?

A. I went across on the ferry.

Q. You went across on the ferry. And you say Mr.—the gentleman who carried the mail on the Nenana side, you [200—171] saw him with the mail taking it up to the postoffice?

A. I left the launch immediately and went to my office with the Commission's mail, and there was only a handful of that. I distributed that, then

(Testimony of W. B. Raeburn.)

went back to the launch. On the way I met Peter Ranstedt with the mail on his shoulder.

Q. How long was that after the boat had landed on the Nenana side?

A. It was probably between five and ten minutes. Couldn't have been longer than that.

Q. How long was the package lying on your desk before you put it in the safe?

A. It couldn't have been more than five or ten minutes, because—

Q. (Interrupting.) You tried to fasten it with an Acme stapler?

A. Yes, and that would only take a minute or two to do that, and as soon as I did that, why, I—

Q. (Interrupting.) Did you succeed in fastening the bottom? A. It didn't do a good job.

Q. And that was the kind of a stapler where you would hit with your hand, isn't it? A. Yes, sir.

Q. Well, did you leave the staple in the sack?

A. Yes, those were left in, I believe.

Q. There is no sign of it in there at the present time?

Mr. CRANE.—I object to argument with the witness. The sack itself shows.

Q. Do you know what became of that staple, Mr. Raeburn?

A. Those were removed when Mrs. Williams, Tunison and myself opened the sack. [201—172]

Q. Then you took that out? A. Yes.

Mr. CLARK.—That's all.

(Testimony of W. B. Raeburn.)

Redirect Examination.

(By Mr. CRANE.)

Q. Mr. Raeburn, was this registered parcel carried on a, as far as postage was concerned, carried on a frank label or was the postage paid on it?

A. Frank label, I believe.

Q. And could you tell at the time whether the tear or cut in the bottom of the sack was a fresh cut or not when you examined it?

A. Well, that is hard to say. It was fairly smooth; it wasn't raveled at that time.

Q. It wasn't raveled like it is now in the exhibit?

A. No.

Q. While this package was on your desk and in your office prior to putting it in the safe were you out of the room or was the package out of your sight at any time?

A. No, sir, it wasn't out of my sight; no.

Mr. CRANE.—That's all.

(Witness excused.) [202—173]

TESTIMONY OF G. WETZLER, FOR PLAINTIFF.

G. WETZLER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. You may state your name.

A. G. Wetzler.

Q. And where do you reside, Mr. Wetzler?

(Testimony of G. Wetzler.)

A. Nenana.

Q. Nenana, Alaska? A. Yes, sir.

Q. Where were you residing in September, 1921?

A. Nenana.

Q. What official position with the Postoffice Department, if any, did you hold in September, 1921?

A. Chief Clerk of the railway mail service in charge of the transportation and supervising the postal service in the interior of Alaska, and Postoffice Inspector.

Q. I will ask you if it was under your supervision that the Postoffice Department adopted the method of transporting mails between Fairbanks and Nenana which was in effect *in* September 16, 1921?

A. Yes, sir, it was.

Q. Have you any official records or reports showing loss of registered mail between those two points during 1921?

Mr. CLARK.—We object, if the Court please, unless it is limited to this particular loss. We object, if the Court please, because the question is too general. If it is limited to this particular loss that is well and good, we have no objection. [203—174]

The COURT.—Objection sustained.

Mr. CRANE.—Exception, please.

The COURT.—Exception allowed.

Q. Mr. Wetzler, on the 16th of September, 1921, you may state whether or not you were notified of a registered package being rifled? A. I was.

Q. And who by?

(Testimony of G. Wetzler.)

A. By the postmistress at Nenana, acting postmistress.

Q. And who was that? A. Mrs. Williams.

Q. And after hearing of this loss did you go—how soon after that did you go to Nenana?

A. On the following day.

Q. Did you make a short investigation at Nenana?

A. I did.

Q. At the time of your investigation did Mrs. Williams, as postmistress at Nenana, turn over to you the contents of the package that was rifled and the mail-sack and the jacket?

A. She did, yes, sir.

Q. I hand you Plaintiff's Identification "E" and ask you if that is the mail-sack turned over to you by acting Postmistress Williams?

A. This is the sack, or pouch, rather.

Q. What did you do with that sack?

A. I brought it, took it from her and brought it to Fairbanks, kept it in my custody until I delivered it to Inspector Fitzgerald some time later.

Q. I hand you Plaintiff's Identification "G," Popular Mechanics magazine, and ask you if you received such a [204—175] magazine from the postmistress at Nenana and turned it over to Inspector Fitzgerald?

A. Yes, sir. This is the magazine.

Q. I show you Plaintiff's Identification "H" and Plaintiff's Identification "I," which is a bill and a finishing nail, and ask if you received these from the postmistress at Nenana and kept them in your

(Testimony of G. Wetzler.)

custody until you turned them over to Inspector Fitzgerald, if you did turn them over to Inspector Fitzgerald?

Mr. ROTH.—We object to that as it assumes a state of facts that has not yet been proven, to wit, that these were received by him.

Mr. CRANE.—I asked him that question, Mr. Roth.

The COURT.—I think the question is a little involved, Mr. Crane.

Mr. CRANE.—Very well.

Q. Did you receive that finishing nail and bill from the postmistress, Mrs. Williams, at Nenana?

A. I did.

Q. What did you do with them?

A. I kept them in my custody until I delivered them to Inspector Fitzgerald.

Q. I hand you Plaintiff's Identification "J" and Plaintiff's Identification "F" and ask you if you received these two, this paper and this coin sack, from the postmistress at Nenana, or similar paper, or, if you can tell, you can state whether it is the same paper or not?

A. This is the same paper and the same sack.

Q. How do you know it is the same sack and paper? [205—176]

A. The paper is initialed. And this coin sack, or sack, contains a—there is a hole in it on the side.

Q. I ask you, Mr. Wetzler, what you did with these two exhibits?

(Testimony of G. Wetzler.)

A. I retained them in my custody until they were delivered to Inspector Fitzgerald.

Q. I will ask you if you also received Plaintiff's Exhibit "A" and Plaintiff's Exhibit "C" from the postmistress at Nenana (handing same to witness)?

A. Yes, sir.

Q. Did you keep them in your custody until you turned them over to Inspector Fitzgerald?

A. I did, yes, sir.

Q. Mr. Wetzler, after leaving Nenana did you make an inquiry and a search of the premises of the postoffice at Fairbanks, Alaska? A. I did.

Q. I will ask you what, if anything, of importance you observed in that search?

Mr. CLARK.—We object, if the Court please, as incompetent, irrelevant and immaterial, and too vague and indefinite. Might have been made in regard to a thousand different things, but it is not confined to anything in connection with this particular transaction.

Mr. CRANE.—Very well.

The COURT.—I think you ought to show what time it was, Mr. Crane.

Q. Mr. Wetzler, when did you make an investigation at the postoffice in connection with the rifling of this registered package at Fairbanks? [206—177] A. On the 18th of September.

Q. Did you find a finishing nail in the postoffice?

A. Found a box with several finishing nails in it.

Q. Where?

A. In the postoffice at Fairbanks, on a shelf.

(Testimony of G. Wetzler.)

Q. State whether or not those finishing nails were similar to the finishing nail which you received from the postmistress at Nenana?

A. They were; identical.

Q. Identical. Mrs. Wetzler, state whether or not you found a large stack of magazines in the post-office at Fairbanks, Alaska? A. Yes, sir.

Mr. CLARK.—We object, if the Court please, as incompetent, irrelevant and immaterial whether there was a large stack of magazines in the post-office at Fairbanks; it has absolutely no bearing upon any of the issues in this case.

The COURT.—Objection overruled.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

Q. Go ahead, Mr. Wetzler.

A. I did. There was a considerable stack of magazines addressed to the St. Matthew's Mission laying on the floor within—well, within eight feet of the working-table.

Q. And where were they in reference to the safe, the small iron safe?

A. Well, they were probably six feet, seven feet from the small iron safe towards the middle of the office.

Q. And what kind of magazines were they, if you know? [207—178]

A. Well, various magazines. Some of them were wrapped; some the wrappers were off.

Q. Now I will ask you if immediately after you finished your investigation in the postoffice at Fair-

(Testimony of G. Wetzler.)

banks, Alaska, if you made an inquiry and investigation on the train between Fairbanks and Nenana and around the Alaska Engineering Commission buildings, warehouses, at Nenana to ascertain whether or not there were—and in the postoffice at Nenana, Alaska, to see if you could find any similar finishing nails to the one in this sack?

Mr. CLARK.—We object, if the Court please, as calling for a conclusion of the witness. It is encumbent upon the witness to tell what he did and for the jury to decide whether or not he made an investigation. He asks if he made an investigation to see if he could find any nails of that character.

The COURT.—Well, I think that is preliminary. It may be answered.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

Q. Did you make such investigation?

A. I made an investigation at the Nenana office, in the Nenana office, and inquired—an investigation at Mr. Raeburn's office.

Q. And what did you find, if anything?

A. I found no finishing nails of that size.

Q. Did you find any finishing nails?

A. No, I can't say that I did.

Q. Now, Mr. Wetzler, in regard to this small, iron safe. [208—179] I will ask you if you know when it was first installed in the postoffice and at whose instance it was installed?

A. Why, it was placed in the Fairbanks office in the spring of 1918 at my request.

(Testimony of G. Wetzler.)

Q. And who furnished it to you?

A. The N. C. Company, lessors of the building.

Q. What did you put that safe in there for?

A. In order that the postmaster could stow his stamp stock and his registered mail.

Q. Did you instruct Postmaster Deal to keep the registered mail in there? A. I did.

Q. Did you instruct him to keep the safe locked?

A. I did.

Q. I will ask you what kind of a lock this is on this pouch (handing pouch to witness)?

A. An L. A. lock.

Q. I will ask you when the L. A. locks were first issued, approximately?

A. In 1915, some time in March.

Q. And when did they come into general use into Alaska? A. Well, it was several months later.

Q. Mr. Wetzler, if an L. A. lock, or the key without any lock had been lost would you be notified of it in the Territory of Alaska?

A. We would, yes, sir.

Mr. CLARK.—We object, if the Court please, as incompetent, irrelevant and immaterial, has no bearing upon the issues in this case.

The COURT.—Objection overruled. [209—180]

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

Q. Did you answer? A. I would, yes, sir.

Q. Have you any record, or were you ever notified of any locks or keys being lost in the Territory of Alaska prior to this robbery? A. No, sir.

(Testimony of G. Wetzler.)

Q. L. A. keys, I mean? A. No, sir.

Q. Are postoffice employees, mail messengers and others who have keys required to receipt for them when the key is issued to them?

A. Any employee that the key is issued to is required to receipt for it.

Q. I will ask you, Mr. Wetzler, if there are any postoffices along the line of the Alaska railroad between Fairbanks and Nenana, or if there were in 1921? A. No, sir, there are not.

Q. Mr. Wetzler, who was the purser on the boat at Nenana at that time, September, 1921?

A. A gentleman by the name of Hamilton. I don't recall his initials.

Q. Did he handle mail?

A. He did between Nenana and Dawson.

Q. Was he under your supervision?

A. He was.

Q. And did he have a key? A. Yes, sir.

Q. And did the postoffice at Nenana have a key to an L. A. lock? [210—181] A. Yes, sir.

Q. And those, as I understand you to say, are the closest keys to Fairbanks between here and Nenana?

A. Fairbanks has a key.

Q. Fairbanks has a key, but there are no keys until you get to Nenana; is that correct?

A. No, sir. That is correct.

Q. What official capacity, if any, did Mr. Jim Fairborn have regarding the mails in September 16, 1921?

A. Mr. Fairborn was the General Agent for the

(Testimony of G. Wetzler.)

White Pass & Yukon Route, who were contractors on mail route 78,092 from Dawson to Fairbanks.

Q. Did Mr. Fairborn have a key to these locks?

A. No, not to my knowledge.

Q. If he had had would you have known of it?

A. I would, yes, sir.

Q. Was Mr. Fairborn employed by the Postoffice Department? A. No, sir.

Q. Upon your return from Nenana to Fairbanks who was with you, if anybody? Anybody come back with you? A. Deputy Marshal Hagan.

Mr. CRANE.—You may inquire.

Cross-examination.

(By Mr. CLARK.)

Q. How long have you been mail clerk and Postoffice Inspector in the interior of Alaska, Mr. Wetzler? A. Since 1917.

Q. When did Mr. Deal become postmaster?

A. I believe in 1914. I am not certain.

Q. So Mr. Deal was postmaster several years before you [211—182] became an inspector here, wasn't he? A. Yes, sir.

Q. He had been handling the mails in and out of Fairbanks for approximately three years before you were appointed? A. Yes, sir.

Q. When you first came here what did he have for holding registered mail in the postoffice?

Mr. CRANE.—Object to that as immaterial, if the Court please, what he had prior to 1918, or prior to the second term of the postmaster which is alleged in the complaint, as improper cross-

(Testimony of G. Wetzler.)

examination, and going into anything prior to the installation of the small, iron safe in the post-office would be incompetent and improper.

Mr. CLARK.—If I may explain, if the Court please. Mr. Wetzler has left the impression here by his testimony that there was carelessness in handling this mail and was no attempt to take care of the mail until he insisted upon getting a safe to put it in. I want to show the Court the facts in the case exactly as Mr. Wetzler knows them.

Mr. CRANE.—If the Court please, Mr. Wetzler testifies he ordered the safe put in there, and they can cross-examine as to anything about that, or any instructions Mr. Wetzler gave him regarding that safe, but anything prior to that I didn't go into and it would be improper cross-examination and incompetent.

Mr. CLARK.—We submit, if the Court please, all [212—183] this is in connection with the whole transaction.

The COURT.—The objection will be overruled.

Mr. CRANE.—Exception.

The COURT.—Exception allowed.

(Question read.)

A. He had that large safe. It wasn't sufficiently large to contain all of these registered matters.

Q. It was an iron box, wasn't it? A. No.

Q. In addition to the big postoffice safe didn't he have an iron box there with a padlock on for holding registered mail?

(Testimony of G. Wetzler.)

A. No, sir, not when I came there.

Q. You never saw anything of that kind in the postoffice? A. After I came there?

Q. Yes, after you came there.

A. At the time that that large box, the large safe was placed there an additional messenger safe was furnished.

Q. Who furnished it?

A. The lessor of the building.

Q. The messenger safe was the iron box, wasn't it, with a padlock on it? A. Yes, sir.

Q. And that belonged to the Northern Commercial Company? A. Well, they furnished it.

Q. And they took it away, too, didn't they?

A. They took it away later.

Q. And didn't Mr. Deal tell you, Mr. Wetzler, that he had made an application to the Northern Commercial Company to loan him a safe to put the registered matter in? [213—184]

A. Not to my recollection, no, sir.

Q. Isn't it a fact, Mr. Wetzler, that Mr. Deal told you that he had made application to the Northern Commercial Company for a safe, and that Mr. Richmond had promised him a safe but that they hadn't delivered it? A. Not to my recollection.

Q. Didn't he also tell you, suggest to you that as Richmond hadn't delivered it, after promising that he would, that you go over and talk to Richmond and maybe Richmond would deliver it? Didn't Mr. Deal tell you that?

(Testimony of G. Wetzler.)

A. I don't recollect that he did, no, sir.

Q. You don't remember that? A. No, sir.

Q. Isn't it a fact that you went over to see Mr. Richmond, and after you saw Mr. Richmond that Mr. Richmond then had the safe delivered in the postoffice?

A. After I saw Mr. Richmond he delivered the safe, but I don't recollect whether I saw Mr. Richmond or Mr. Coleman, who was the agent at that time.

Q. Isn't it a fact that you went to Mr. Richmond or Mr. Coleman, whichever one it was, at the request of Mr. Deal, the postmaster?

of Mr. Deal, the postmaster?

A. No, sir, it is not.

Q. It is not the fact. And you swear positively that Mr. Deal did not ask you to go and see Mr. Richmond or Mr. Coleman, whichever one it was, in regard to that safe?

A. No, I have no recollection of that.

Q. You have no recollection?

A. No. [214—185]

Q. Do you know to whom that safe was delivered? A. In which way do you mean?

Q. Was it delivered to the Government or was it delivered to Mr. Deal?

A. It was placed in the postoffice.

Q. Don't you know that the Northern Commercial Company took Mr. Deal's personal receipt for that safe?

(Testimony of G. Wetzler.)

A. I do not know, no, sir.

Q. You don't know that? A. No, sir.

Q. Don't you know as a matter of fact, Mr. Wetzler, that that is a personal borrowing by Mr. Deal from the Northern Commercial Company?

A. No, sir, I do not.

Q. You don't know that. The Government did not furnish any receptacle of any description for keeping registered mail, did it?

A. The department furnished a large, iron safe and it was insufficient, and on my arrival there I went to Mr. Richmond or Mr. Coleman, I don't remember which, and asked them to furnish an additional safe to properly protect the valuables, registry or stamp stock.

Q. Was it the duty of the Northern Commercial Company under their lease to the United States Government to furnish another safe?

Mr. CRANE.—Object to that, if the Court please, as incompetent and calling for a conclusion of the witness.

The COURT.—Objection sustained.

Q. Have you ever seen the lease from the Northern Commercial Company to the United States of America concerning the [215—186] building and the furniture that went with it?

Mr. CRANE.—Same objection, your Honor, and as incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. CLARK.—Exception.

(Testimony of G. Wetzler.)

The COURT.—Exception allowed.

Mr. CLARK.—I don't want to act contrary to the Courts ruling, but there has been an attempt to show Mr. Deal was not making any effort to properly protect the mail until he, Mr. Wetzler, went and insisted upon certain things being done.

The COURT.—If you draw that conclusion from the testimony you are welcome to do that, but his testimony was there was already a large safe there and still wasn't sufficient to hold the registered packages and valuable matter connected with the postoffice, and that he saw a necessity for an additional one, and that he went and got one, or asked Mr. Coleman or Mr. Richmond to furnish one. I understand his testimony to be that way.

Q. But you do say that was done of your own volition and not at the request of Mr. Deal?

A. Yes, sir, I do.

Q. Is there any regulation of the Postoffice Department requiring registered matter to be kept in a safe? A. There is, yes, sir.

Q. Will you point it out to me in the book of regulations?

Mr. CRANE.—Object to that, if the Court please, as improper cross-examination of this witness. [216—187]

The COURT.—Objection sustained.

Mr. CLARK.—Does the Court sustain the objection?

The COURT.—Yes, sir.

(Testimony of G. Wetzler.)

Mr. CLARK.—He has already answered that there is a regulation.

The COURT.—I sustain the objection as immaterial.

Mr. ROTH.—We except, if the Court please.

The COURT.—Exception allowed.

Q. In your investigations concerning nails you found a box in the postoffice, I understand, with a lot of nails in, didn't you? A. Yes, sir.

Q. And among others was a nail such as the one that has been introduced in evidence?

A. The identical nails. I don't know how many, I don't recall exactly the number now, but there was quite a few.

Q. You mean to say they are identical nails?

A. The same size.

Q. You wouldn't say they came off the same piece of wire, would you?

A. No, I couldn't say that.

Q. And in your investigation to see if it might be possible that the mail came from some other place you examined the postoffice at Nenana and Mr. Raeburn's office? A. Yes, sir.

Q. Did you examine around the railroad depot?

A. No, sir.

Q. Did you go into any of the freight cars where freight had been carried?

A. No, sir. [217—188]

Q. Did you go into the box-car that carried that mail to Nenana on the morning of the 16th?

(Testimony of G. Wetzler.)

A. I did not, no, sir.

Q. Did you go anywhere around the wharf or dock at North Nenana? A. No, sir.

Q. Did you look any place on the ferry-boat that plied between North Nenana and Nenana proper? A. No, sir.

Q. The only places you examined to see if there were any other nails of that kind was in Nenana at the postoffice and in Mr. Raeburn's office. Did you go over to the Northern Commercial Company and ask them if they had nails of that kind for sale?

Mr. CRANE.—Oh, we object to that, if the Court please, inquiring around hardware stores or such places. That is not proper cross-examination.

The COURT.—Objection sustained.

Q. Was a ten-penny nail a rarity in your experience, Mr. Wetzler?

A. No, I can't say that it was.

Q. No. You saw a whole lot of mail in the postoffice of Fairbanks, didn't you, scattered around there in different places when you went in there to examine to see if you could find some magazines?

A. Yes, there was considerable mail in the office, yes, sir.

Q. Did you find the twin brother of this Popular Mechanics that you have found here?

A. No, sir, but I looked for the back of that magazine, that is what my— [218—189]

Q. (Interrupting.) Did you find it?

A. No, sir.

(Testimony of G. Wetzler.)

Q. You searched thoroughly around the waste paper baskets and all around the office of the postoffice for the wrapper of that magazine and didn't find it, did you? A. No, sir, I didn't.

Q. Is this sack here, this lock that is found on this sack that you have identified, that is a similar lock to all mail sacks of this iron like variety?

A. Of that variety, yes, sir, L. A.

Q. It is opened by an ordinary key made for this particular lock? A. Yes, sir.

Q. That isn't what is called a Yale lock, is it?

A. No, that is called an L. A. lock.

Q. What do you mean by an L. A. lock?

A. Well, that is a series or the species of the lock that they turn out.

Q. Nothing very intricate about that, is there?

A. No, sir.

Q. A man a little bit expert with a piece of steel wire that was accustomed to picking locks could pick it without any difficulty, couldn't he?

A. I doubt if he could.

Q. Don't think it possible?

A. If he had time he could, yes, sir.

Q. If he had time he could do it, you believe, don't you? It isn't constructed on the same principle as a Yale lock, is it? A. No, sir.

Mr. CRANE.—Object to that as calling for an [219—190] opinion and conclusion of the witness.

Q. Now in every postoffice in Alaska and in many of the states, in the postoffices in the states

(Testimony of G. Wetzler.)

that use these locks, I suppose they have a key that will fit that?

A. All offices have a key that will fit that lock.

Q. Those keys are ordinarily fastened on a chain hung around near the work-table, aren't they?

A. Yes, sir.

Q. So that they are readily secured?

A. They are.

Q. There is no attempt made to put them in safes at night?

A. The regulations require that they be kept chained fast to the working-table and be kept in a drawer under that table.

Q. That drawer is not locked with a combination, is it? A. No, sir.

Q. Anyone that could get into a work-room and get hold of that key could make a wax impression of it, couldn't they?

A. I don't doubt but what they could.

Q. You have known of mail sacks to be opened, haven't you, by people with dummy keys?

A. No, sir.

Q. Never heard of it? A. No, sir.

Q. They generally don't take the trouble; they generally cut the sack, don't they? A. Yes.

Q. How long after these things were turned over did you turn them over to Mr. Fitzgerald? [220—191]

A. Well, I can't give you the exact date. Mr. Fitzgerald returned here on the 23d of September,

(Testimony of G. Wetzler.)

and I suppose I gave them to him the next day, the 24th.

Q. You have some identification mark on some of these papers, have you? A. Yes, sir.

Q. Is that your identification that you refer to, Mr. Wetzler (indicating)? A. Yes, sir.

Q. You were in Fairbanks when you were notified about this depredation upon that sack, were you not? A. Yes, sir.

Q. And then you went down to Nenana to investigate? A. I went the following morning.

Q. You were in Fairbanks on the morning of the 16th, weren't you? A. Yes, sir.

Q. You were in the postoffice, were you not, when the mail was dispatched? A. I were.

Q. You saw Mr. Fairborn there?

A. Mr. Fairborn.

Q. Did you give Mr. Fairborn a letter to mail?

A. I don't recall whether I did or not. I may have.

Q. You say that the method of handling mail between Fairbanks and Nenana was adopted by the Government upon your suggestion, is that what you stated a while ago?

A. The method was adopted as it was the only method that we could use, and we used it, and I was on the ground and I had knowledge of how we were handling it.

Q. And you considered it a perfectly safe method of [221—192] carrying mail, did you, to

(Testimony of G. Wetzler.)

have it put in a freight-car without freight clerks, without anyone to guard it, in a car from which freight is taken out at every station along the road?

Mr. CRANE.—We object to that, if the Court please, as incompetent, improper cross-examination and calling for the conclusion and the opinion of the witness.

Mr. CLARK.—Now, if the Court please, he said that it was upon his recommendation, and it was brought out on direct examination, if the Court please, and I think it is perfectly competent to show the reasons of recommending this particular system.

The COURT.—Objection sustained.

Mr. CLARK.—We note an exception.

The COURT.—Exception allowed.

Q. Did you know how the mail was being carried between here and Nenana, Mr. Wetzler?

A. I did, yes, sir.

Q. Did you know it was being carried in a freight-car? A. Yes, sir.

Q. Did you know that it was being carried in a car from which freight was taken out every time they stopped en route? A. Yes, sir.

Q. You knew, did you not, that there was no sworn mail clerk on that freight train?

Mr. CRANE.—Object to that as improper cross-examination and immaterial.

The COURT.—Overruled.

(Testimony of G. Wetzler.)

Mr. CRANE.—Save an exception. [222—193]

The COURT.—Exception allowed.

Q. You knew there was no mail clerk?

A. Yes, sir.

Q. You knew there was no sworn mail clerk of any description to handle that mail at any point from the time it left the express wagon at the depot until it was delivered to a carrier on the Nenana side? A. Yes, sir.

Q. Mr. Wetzler, you have identified these various articles that were delivered to you by Mrs. Williams. You are positive of your identification of them, are you? A. I am, yes, sir.

Q. Of the mail?

Mr. CRANE.—Object to the form of that question, if the Court please. If you recall the testimony, I said in offering it to the witness a similar nail, similar paper, or similar so on.

Mr. CLARK.—Do you contend this is the identical nail or one you say was similar to the one—

Mr. CRANE.—(Interrupting.) I will show later that is the identical nail that was delivered to Mr. Fitzgerald.

Mr. CLARK.—Well, if the Court please, Mr. Wetzler identified that nail.

Mr. CRANE.—That is the one he received from Mrs. Williams. You may cross-examine him on that all you want.

Q. Is that the same nail you received from Mrs. Williams? A. Yes, sir.

(Testimony of G. Wetzler.)

Q. How do you know?

A. Well, I retained all the exhibits in my possession until [223—194] I delivered them to Inspector Fitzgerald, and he has retained them in his possession—

Q. (Interrupting.) Now wait, Mr. Wetzler. You delivered the identical nail that was delivered to you by Mrs. Williams, you delivered it to Mr. Fitzgerald?

Mr. CRANE.—I object to that, if the Court please, as incompetent, irrelevant and immaterial, and improper cross-examination; and further that the witness only testified that he delivered them to Mr. Fitzgerald. Beyond that he hasn't identified them.

The COURT.—Objection overruled.

Mr. CRANE.—Exception.

The COURT.—Exception allowed.

Q. You retained it in your possession. You say the nail you gave to Mr. Fitzgerald was the same nail that Mrs. Williams gave you? A. Yes, sir.

Q. When you gave it to Mr. Fitzgerald you have had no further control over it since that time?

A. None whatever.

Q. You are not willing to say, are you, Mr. Wetzler, that is the identical nail that you gave Mr. Fitzgerald?

A. I am this way. That wrapper contains—

Q. (Interrupting.) No, that is not the question.

(Testimony of G. Wetzler.)

The COURT.—I think he ought to be allowed to answer the question, Mr. Clark.

Mr. CLARK.—All right.

A. (Continuing.) The wrapper contains an identification, and we would have, or Mr. Fitzgerald would have no reason to change. [224—195]

Q. But that isn't the question, Mr. Wetzler. I am asking you if you can swear positively that is the identical ten-penny nail you gave to Mr. Fitzgerald?

A. I would swear positively that that is the identical nail due to my confidence in Mr. Fitzgerald.

Q. Then you are basing it on your confidence rather than on your recognition of the nail?

A. I recognize the wrapper and the coin sack and the bill and the other articles there that I have personal knowledge of. They are something that you can recognize them by.

Q. All ten-penny finishing nails look alike, don't they? A. Yes, sir.

Q. That might have been substituted twenty times between the time you gave it to Mr. Fitzgerald and the present time?

A. It might have been, but I am confident it hasn't.

Q. Now did you take that nail with you when you came to the postoffice here to examine to see if you could find any nails like it?

A. No, sir, I did not.

Q. Well, then you didn't have that nail with you when you examined the nails in the postoffice?

(Testimony of G. Wetzler.)

A. The nails in the office were the same size. I don't know the size of that, but it is easy to obtain the size of that.

Q. The same size nails?

A. Yes. Particular care was taken that I didn't confuse any of the other nails with that either.

Q. But you didn't have this nail with you to make any comparisons when you went to the postoffice? [225—196]

A. I had that nail in my possession among the other exhibits at that time.

Q. Yes, but you didn't have it with you in the postoffice with you?

A. No, not out carrying it around in my pocket, no, sir.

Q. These nails in the postoffice were not concealed, were they? A. No, in no way at all.

Q. They were up in a box on the window sill, weren't they?

A. No, I think they were on one of those shelves on the side of the building.

Q. Not back in the work-room, was it?

A. In the work-room, yes, sir, off to the—well, right ahead of the washstand there there is a row of shelves.

Q. By the work-room I mean back of the grill-room next to the safes? A. No, not in there.

Q. Clear around in the other part of the main work-room?

A. Out in the main work-room on one of the shelves.

(Testimony of G. Wetzler.)

Q. Just such a box of nails you would find in any place where they have repairing to do?

A. Yes, sir.

Q. Mr. Wetzler, you said a moment ago that the nearest keys to Fairbanks would be the ones at Nenana? A. Yes, sir.

Mr. CRANE.—Between here and Nenana.

Q. What you meant was along the railroad?

A. Yes, sir.

Q. There is a key at Cleary and Esther, and wherever there is a postoffice?

A. Well, Berry is six miles off from the railroad. I mean [226—197] such as Happy, or Dunbar, or—

Q. (Interrupting.) Yes, that is what I understood. As the mail carrier from Dunbar carries the mail to Livengood does he have a key?

A. No, sir.

Q. That is only in the possession of the postmaster at Livengood?

A. The postmaster at Livengood, yes, sir.

Mr. CLARK.—That's all.

Redirect Examination.

(By Mr. CRANE.)

Q. Mr. Wetzler, during the time that the mail was handled in this way that you explained to Mr. Clark on cross-examination were there any mail sacks, or any registered parcels or any letters lost, or any robberies, or anything stolen?

Mr. CLARK.—We object, if the Court please, as incompetent, irrelevant and immaterial.

(Testimony of G. Wetzler.)

Mr. CRANE.—Counsel brought out on cross-examination the way that they handled mail; he also brought out the interior of the postoffice. I think on redirect I have a right to clear that up.

Mr. CLARK.—We were limited in our examination merely to his recommendation and to the fact as to how it was carried between here and Nenana.

The COURT.—The objection will be overruled.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

Q. (Question read.)

A. No, sir. [227—198]

Q. All right. During your investigation of the postoffice at Fairbanks, Alaska, when you found these magazines, did your investigation also reveal a large piano box on the floor of the postoffice?

Mr. ROTH.—We object to that on the ground the same is incompetent, irrelevant, immaterial and not redirect examination.

The COURT.—Objection sustained.

Mr. CRANE.—Exception, please.

The COURT.—Exception allowed.

Q. Mr. Wetzler, how far were the stack of magazines from the safe in the postoffice?

Mr. CLARK.—We object, if the Court please, as once having been asked and answered on his direct examination.

The COURT.—Objection sustained.

Q. Mr. Wetzler, did your investigation reveal the condition of the interior of the postoffice to be that

(Testimony of G. Wetzler.)

a person could be in the interior of the postoffice, be working in there quietly and not be observed from the outside?

Mr. CLARK.—Now, if the Court please, we object to it as incompetent, irrelevant and immaterial, leading, suggestive, and calling for a conclusion of the witness.

The COURT.—Objection sustained.

Mr. CRANE.—Very well.

Q. How long have you worked for the Postoffice Department in Alaska altogether; not just the interior, but in Alaska altogether? A. Since 1908.

Q. Where did you work before coming to the interior? [228—199]

A. Southeastern Alaska.

Q. Mr. Wetzler, in your investigation of this case did you ascertain as to whether or not large shipments of currency by registered mail had been shipped from the First National Bank at Fairbanks, Alaska, to the disbursing agent at Healy, Alaska, of the Alaska Engineering Commission?

Mr. CLARK.—To which we object as not redirect examination. If anything it would be their case in chief.

Mr. ROTH.—And incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

A. The package that was lost, pilfered, was the

(Testimony of G. Wetzler.)

twenty-third package shipped from the First National Bank to Frank Doner at Nenana.

Q. Had any prior losses been reported to you of anything shipped by registered mail?

Mr. ROTH.—That is objected to on all of the grounds last stated, if the Court please.

The COURT.—Sustained.

Mr. CRANE.—That is all, Mr. Wetzler.

(Witness excused.)

(Recess.) [229—200]

TESTIMONY OF J. E. FITZGERALD, FOR PLAINTIFF.

J. E. FITZGERALD, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. You may state your name.

A. J. E. Fitzgerald.

Q. Your occupation? A. Postoffice Inspector.

Q. How long have you been a Postoffice Inspector, Mr. Fitzgerald?

A. Approximately nine years.

Q. When did you first come to Alaska on inspection work, Mr. Fitzgerald? A. 1919.

Q. Mr. Fitzgerald, were you a Postoffice Inspector in 1921? A. Yes, sir.

Q. Did you make an investigation of the rifling of a registered parcel at Fairbanks in 1921?

A. Yes, sir.

(Testimony of J. E. Fitzgerald.)

Q. I will ask you, Mr. Fitzgerald, if during that investigation Inspector Wetzler turned over the exhibits to you and you took charge of them?

A. He did.

Q. I hand you Plaintiff's Identification "G" and ask you if that is the magazine Mr. Wetzler turned over to you? A. Yes, sir.

Q. Has that been in your custody, Mr. Fitzgerald, from the time Mr. Wetzler turned it over to you until it was produced in court here?

A. Yes, sir. [230—201]

Q. You may state whether or not the condition is the same or if there is any difference, and if so what it is?

A. The magazine was clean when I received it. It wasn't as thick as this due to the handling of it.

Mr. CRANE.—I ask that Plaintiff's Identification "G" be marked and received in evidence.

Mr. CLARK.—No objection.

The COURT.—It may be admitted and marked.

(Magazine referred to received in evidence, marked Plaintiff's Exhibit "G" and made a part of the record herein.)

Q. Mr. Fitzgeral, I hand you Plaintiff's Identification "E," which is a mail pouch, and ask you if that is the pouch you received from Mr. Wetzler?

A. Yes, sir, this is the pouch.

Q. Has that been in your custody from the time you received it from Mr. Wetzler until it was brought into this court? A. Yes, sir.

(Testimony of J. E. Fitzgerald.)

Mr. CRANE.—I ask that this be marked and admitted into evidence.

Mr. CLARK.—No objection.

The COURT.—It may be admitted and marked.

(Mail pouch referred to received in evidence, marked Plaintiff's Exhibit "E" and made a part of the record herein.)

Q. I hand you Plaintiff's Identification "H," a finishing nail. Examine it and ask you if that is the one that Mr. Wetzler gave you?

A. This is the nail.

Q. Has that been in your custody until it has been brought into this court?

A. Yes, sir. [231—202]

Mr. CRANE.—We offer this in evidence, if the Court please.

Mr. CLARK.—No objection.

The COURT.—It may be admitted and marked.

(Nail referred to received in evidence, marked Plaintiff's Exhibit "H" and made a part of the record herein.)

Q. I hand you Plaintiff's Identification "I" and ask you if that is the letter which you received from Mr. Wetzler and if it has been in your custody up to the time it was brought into this court?

A. This is the letter, and it has been in my custody ever since.

Mr. CRANE.—If the Court please, I ask that this be marked and admitted in evidence.

Mr. CLARK.—No objection.

The COURT.—It may be admitted and marked.

(Testimony of J. E. Fitzgerald.)

(Letter referred to received in evidence, marked Plaintiff's Exhibit "I" and made a part of the record herein.)

Q. I hand you Plaintiff's Identification "F," a piece of brown paper, and ask you if that is the paper which you received from Mr. Wetzler?

A. Yes, sir.

Q. Has that been in your custody until you brought it into court? A. Yes, sir.

Mr. CRANE.—I ask that be marked and admitted in evidence.

Mr. CLARK.—No objection.

The COURT.—It may be admitted and marked.

(Brown paper referred to received in evidence, marked Plaintiff's Exhibit "F" and made a part of the record herein.) [232—203]

Q. Plaintiff's Identification "J," which is a coin bank containing some coin. Ask you if that is the coin sack that you received from Mr. Wetzler, also how much coin it contains?

A. This is the sack, and it contains $37.65.

Q. Has that been in your custody until it was brought into court? A. Yes, sir.

Mr. CRANE.—I ask that be marked and admitted in evidence.

Mr. CLARK.—No objection.

The COURT.—It may be admitted and marked.

(Coin and sack and contents received in evidence, marked Plaintiff's Exhibit "J" and made a part of the record herein.)

Q. Now, Mr. Fitzgerald, where were you when

(Testimony of J. E. Fitzgerald.)

you were first notified about the rifling of this registered pouch or parcel No. 1045?

A. I was at Chitina, Alaska.

Q. Did you immediately come to Fairbanks as soon as you could get availavle transportation?

A. Yes, sir.

Q. And what did you first do upon your arrival at Fairbanks, Alaska?

A. I made a general investigation as to the conditions and the causes of the rifling.

Q. Mr. Fitzgerald, in that investigation—I will ask you first if in the postoffice at Fairbanks, Alaska, you found finishing nails similar to the one that was in the canvas bag?

Mr. CLARK.—We object, if the Court please, as not having confined it to any time, approximately [233—204] the time of this alleged robbery, and as too remote in time, and there is nothing to show the postoffice was in the same condition as it was on the 16th of September, 1921.

The COURT.—I think you ought to show approximately when this was, Mr. Crane.

Q. Mr. Fitzgerald, you say you were at Chitina when you received the word of this robbery or the rifling of this package. When did you arrive in Fairbanks from Chitina?

A. 11:30 P. M., September 23, 1921.

Q. Did you immediately go to work on that investigation? A. Yes, sir.

Q. The next day were you in the postoffice at Fairbanks? A. Yes, sir.

(Testimony of J. E. Fitzgerald.)

Q. Did you at that time make a search in the postoffice for finishing nails similar to the one that Mr. Wetzler turned over to you?

Mr. CLARK.—To which we object, if the Court please, as irrelevant, incompetent and immaterial, and no foundation laid, and hasn't shown the postoffice was in the same condition as on the 16th of September, and that it is calling for a conclusion of the witness.

The COURT.—Overruled.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

A. I made a search, yes, sir.

Q. What did you find?

A. I found several finishing nails, the same kind as the one that was stuck in the sack. [234—205]

Q. Mr. Fitzgerald, in conducting you investigation next day did you examine and search the car in which the mail sack was in from Nenana to Fairbanks?

A. I don't know whether it was the next day or not, but during the course of the investigation we searched every place we went to, cars, depots, postoffices, and along the line.

Q. In that search anywhere else along the line did you find any similar nails? A. No, sir.

Q. Did you look for them? A. Yes, sir.

Q. Did you look at Nenana? A. Yes, sir.

Q. And did you look in this same car that carried the mail? A. Yes, sir.

Q. And you found none at any of these places?

(Testimony of J. E. Fitzgerald.)

A. No, sir.

Q. Mr. Fitzgerald, did you notice any magazines in the postoffice the day that you were there?

A. Yes, sir.

Q. Mr. Fitzgerald, did you have a conversation during this investigation with the defendant Deal regarding the combination on the safe?

A. Yes, sir.

Q. When and where was that conversation?

A. It was about the 26th day of September, 1921, in the postoffice.

Q. What was the nature of it?

Mr. ROTH.—I would like to have the foundation laid before that question is asked, who was present [235—206] and when it was.

Mr. CRANE.—I omitted to ask him who was present.

Q. Who was present, if anybody, besides you and the defendant?

A. Mr. Deal was there. I don't know whether or not Mr. Wetzler was there.

Q. Now I will ask the same question as to what the conversation was?

The COURT.—What time of day was it?

A. Oh, I think it was some time in the afternoon.

Q. What was the nature of that conversation, Mr. Fitzgerald? A. I took up—

Mr. CLARK.—(Interrupting.) We object, if the Court please, unless it is confined to a conversation concerning the condition of the safe at the

(Testimony of J. E. Fitzgerald.)

time in question, to wit, the 16th day of September, 1921.

Q. I will ask you, Mr. Fitzgerald, to so confine your conversation.

A. I talked to Mr. Deal relative to the condition of the small, iron safe before September 16, 1921. He told me the safe was furnished by the Northern Commercial Company about three years previous. I asked him had he changed the combination as required by 361 of the postal laws and regulations, and he didn't give me any answer. I asked him how the safe was locked that night, that is, the night of September 15, 1921, and he told me the safe was locked on the day combination, that is, turning the knob one or two notches either to the right or to the left. I further asked him how the safe [236—207] was opened in the morning, and he told me it was opened by Miss Smith in the same manner, turned a notch or two either to the right or to the left, all depending how the combination was turned.

Mr. CRANE.—You may inquire.

Cross-examination.

(By Mr. ROTH.)

Q. Mr. Fitzgerald, just what did you find in the postoffice there with reference to nails when you were looking for nails?

A. On the side of the postoffice toward the wall we found a nail box. In that nail box there was a—I don't know how many nails, but among these

(Testimony of J. E. Fitzgerald.)

nails were nails, in fact, a facsimile of the one in the sack.

Q. Were there any other kind of nails in that box? A. Yes, sir.

Q. Then you did find other kind of nails there, did you? A. Yes, sir.

Q. Did you find any other nails anywhere else in the postoffice?

A. I don't recall outside of the nail box.

Q. And where were they with reference to this safe, that is, the small safe, I mean?

A. Oh, I imagine it was about fifteen or twenty feet across the floor.

Q. Is that all?

A. I imagine it is about fifteen or twenty feet. I don't know the exact distance.

Q. Don't you know it is more than that across the floor? [237—208]

A. I don't think it is much more than twenty-five feet.

Q. Might it not be forty feet?

A. I don't think so, no, sir.

Q. You are not quite sure as to the distance, however? A. No, sir.

Q. Now you made a very thorough search for nails the entire distance between Fairbanks and Nenana?

A. On the cars, and through the depots which I got off at, and the postoffice, and the ferry-boat coming across; in fact, every place I went for sev-

(Testimony of J. E. Fitzgerald.)

eral days during the investigation I was looking for nails every place I went to see if we could find some nails like this so we could try to fix the responsibility in case this loss didn't occur in this office.

Q. And you didn't find any nails? A. No, sir.

Q. No nails at all? A. No, sir.

Q. You came to the conclusion then, as a United States detective, that the only finishing nails that there were in the interior of Alaska was in this postoffice? A. I am no detective, Mr. Roth.

Q. Aren't you? A. No, sir.

Q. Well, you were doing detective work then, weren't you?

A. I was doing investigating work.

Q. That was not detective work?? A. No, sir.

Q. Well, at any rate, then, as an investigator you came to the conclusion that the only finishing nails of that size that there was between Fairbanks and Nenana was [238—209] in the Fairbanks postoffice, didn't you?

Mr. CRANE.—Objected to as calling for a conclusion of the witness and not proper cross-examination.

The COURT.—Overruled. He may answer.

A. All the places which I visited and examined I couldn't find any of the nails similar to the nails found in the postoffice and in the sack.

Q. You didn't want to find any, did you?

A. I did want to find them.

(Testimony of J. E. Fitzgerald.)

Q. The only place you wanted to find nails was in this Fairbanks postoffice?

A. No, sir, I had no reasons at all to find them in the Fairbanks postoffice. No matter if it was at Nenana or the railroad where this loss occurred, we tried to fix it fairly. We don't want to try to put anything onto the Fairbanks postoffice.

Q. You proceeded about that with about the same feeling you are talking now? A. No, sir.

Q. You were milder then than you are now?

A. Yes, I talked to you about it, Mr. Roth, when you were United States District Attorney and you know how I felt at that time.

Q. Now when was it that you searched this particular car that this nail was carried down on to Nenana? A. Oh, two or three days afterwards.

Q. How long?

A. I don't know the exact date, Mr. Roth. Some time during the investigation.

Q. All right. How long did this investigation take place? A. Oh, about a month's time. [239—210]

Q. Some time during the month you examined that car? A. Yes, sir.

Q. That is as close as you can fix the time?

A. Yes, sir.

Q. And you didn't find any finishing nails in it?

A. No, sir.

Q. How do you know it was the same car?

A. I could tell by the number.

Q. Where did you get the number?

(Testimony of J. E. Fitzgerald.)

A. Through the investigation from the railroad people.

Q. Just tell me what kind of a record they kept of the car that that mail was in according to your investigation, what you found about that?

A. The conductor had a list of the cars and at the station they had a list of how the train was made up, the different cars in the train.

Q. Did you get it from the conductor, what number car this mail was in?

A. I got it both from the conductor and the agent.

Q. You got it from the conductor, too?

A. Yes, sir.

Q. You are sure about that? A. Yes, sir.

Q. And in your investigation what did you find out with reference to how that car was fastened during the trip, the doors of that car were fastened to Nenana?

A. I found out from the train crew and from others that they were fastened with steel hooks on each side while the train was in motion and while the doors weren't open.

Q. At this time the Fairbanks postoffice and the route [240—211] between here and Nenana I presume was under your jurisdiction as Inspector, was it?

A. Not the railroad, no, sir. It is a general supervision, but Mr. Wetzler had direct and immediate charge of it.

Q. But you were over Mr. Wetzler, were you not?

(Testimony of J. E. Fitzgerald.)

A. I am a representative of the Postmaster General, but we don't take direct action on railroads if it is handled through the railway mail service only when referred to us by the Department.

Q. Was Mr. Wetzler under your orders at that time? A. Not exactly, no, sir.

Q. Was he in any way? You say not exactly. What do you mean by not exactly?

A. Mr. Wetzler works with us, but he is not under my directions at no time, no, sir.

Q. He was not at that time? A. No, sir.

Q. Now where did you keep these things in your possession? You say you had them in your possession until they were produced in court here?

A. Took them down to Seattle, Washington, and put them in my desk.

Q. And they were in your desk in Washington all the time? A. Seattle, Washington, yes, sir.

Q. In Seattle, Washington? A. Yes, sir.

Q. Now you found some magazines in this United States postoffice in the course of your inspection there, did you not? A. Yes, sir.

Q. What kind of magazines did you find there? [241—212]

A. All kinds of magazines.

Q. Well, just name some. Did you find any Popular Mechanics?

A. I don't recall finding any Popular Mechanics, no, sir.

Q. Well, you would have noticed that if you had found any, wouldn't you?

(Testimony of J. E. Fitzgerald.)

A. For July, 1921, I would, yes, sir.

Q. Well, you would for any month, wouldn't you?

A. No, we were looking for one particular July, 1921, because that was the magazine was put in.

Q. You didn't find any part of it there?

A. No, sir.

Q. Did you find that part of that magazine anywhere else? A. No, sir.

Q. Sure you didn't? A. Yes, sir.

Q. Well, did you make an investigation—in the course of your investigation did you ascertain the size of the package that contained this money on that day? A. Yes, sir.

Q. You did, eh? A. Yes, sir.

Q. What size?

A. I got the information from Mr. Hutchinson and he gave me the approximate size.

Q. Well, what size?

A. I don't recall exactly now the exact dimensions. We had it at that time, but I can't recall the exact dimensions right now.

Q. Do you remember how many particular bills there were in that package right now? [242—213]

A. No, I know the numbers, but I can't recall the denominations, the amounts, at this time.

Q. I am not asking for the denominations. How many separate bills went to make up that package?

A. 20's, 10's and 50's.

Q. Twenty tens?

A. No, denominations of 20's, 10's and 50's.

Q. How many 20's were there?

(Testimony of J. E. Fitzgerald.)

A. I don't know the exact amount right now.

Q. How many 10's?

A. I can't recall right now.

Q. You don't know?

A. Not at the present time.

Q. Did you do any experiment to see what size package those bills would make? A. Yes, sir.

Q. You did? A. Yes, sir.

Q. What size?

A. Oh, the size a little longer than the ordinary bill and about this high (indicating), why, as Mr. Hutchinson told me, about two inches high. That is the best of Mr. Hutchinson's recollection. He told me they squeezed them down pretty tight to make a neat package of them.

Q. Didn't you tell me they were a square package?

A. No, they weren't a square package, no, sir.

Q. You state that you had a conversation with Mr. Deal about that safe, little iron safe. Now that conversation you had before the 16th of September, 1921, as I understand you? [243—214]

A. This conversation I refer to, my testimony was after September 16, 1921.

Q. Didn't you say that you had a conversation with him about that safe before that time?

A. No, sir.

Q. All right. He told you, as I understood you, that the N. C. Company had furnished that safe?

A. The N. C. and the lessors furnished it.

Q. What is that?

(Testimony of J. E. Fitzgerald.)

A. The N. C. had furnished it to the postoffice Department for use in the postoffice.

Q. What did you say about leases just now?

A. The N. C. had a lease of the premises at that time and they rented it on a monthly basis, and with it goes the heat, light, safe, equipment and everything else.

Q. Are you sure about that? A. Yes, sir.

Q. Have you that lease?

A. It is now on a monthly basis, the same identical proposition.

Q. Have you that lease?

A. We are not under lease at the present time.

Q. Did you ever read that lease?

A. Yes, sir.

Q. You are sure you did?

A. I have read the general leases but haven't read this particular lease, no, sir.

Q. I mean this lease we are talking about under which you say that they leased to the Government the building space and equipment; did you read that lease? A. No. I didn't read the lease. [244—215]

Q. Then how can you testify as to what its contents were if you didn't read it?

A. I know what the general contents of all leases are.

Q. Then your testimony here is general and not particular, is that it?

A. Oh, not exactly. All depends upon leases and what particular lease the place is under.

(Testimony of J. E. Fitzgerald.)

Q. Now, as a matter of fact, did not Mr. Deal tell you that he had procured this little safe from the N. C. Company to put registered mail in?

A. He said the N. C. furnished the safe.

Q. Well, didn't he tell you what I asked you just now?

A. I asked him where he obtained the safe from and he said from the N. C. Company. He didn't tell me he requested it from the N. C. Company, but they just furnished the safe, but he didn't tell me he requested it.

Q. Don't you know, as a matter of fact, that safe was procured long after the lease was made under which they were holding the postoffice building?

A. I know it was obtained in 1918. I don't know whether it was leased then or not.

Q. Then you don't know anything about it, do you?

A. I do know something about it, yes, sir.

Q. Only what Mr. Deal told you?

A. No, sir.

Q. Then what do you know about it?

A. What I know about the lease is this, I have taken it up with the Department about the lease of the premises and they rent it on a month to month basis. The N. C. Company, at the time I made inquiry, did not want to enter into a long term of years on a lease, and they [245—216] agreed to give us what was over there on a month to month basis on the same rent.

Q. Was that the agreement under which Mr. Deal

(Testimony of J. E. Fitzgerald.)

was holding the postoffice in that building at that time? A. Yes, sir.

Q. And you read that lease?

A. It is no lease at all right now, it is an agreement.

Q. At that time wasn't it a lease?

A. I am not positive if there was or not; can't recall.

Q. Don't know. Well, you are, then, positive that Mr. Deal did not himself personally procure that small iron safe in there from the N. C. Company?

A. I don't know whether he did or not. I can't say absolutely.

Q. No. Well, from this conversation that he had with you didn't he tell you that?

A. He never told me—he didn't tell me how he got the safe, whether it was on a lease or whether the N. C. Company furnished it, or who requested it, or anything else. We took up the proposition of the safe proposition for the purpose of trying to find out whether or not that combination was properly changed and locked in order to try to fix responsibility in this case. We go in it in all of these safes to find out whether the combination has been changed, and who has got the combination, and everything around a safe so we can try to run these mysteries down, that is, to try to fix responsibility and to try to recover the money taken.

Q. All right. That safe had been in the postoffice there for quite a little while, hadn't it been?

(Testimony of J. E. Fitzgerald.)

[246—217]

A. Since 1918.

Q. And had you made any inquiries about the combination before that time?

A. I don't know whether I did or not.

Q. And I suppose you would be very much surprised if Mr. Deal would produce a receipt here showing that that safe was delivered to him personally by the N. C. Company, wouldn't you?

A. Nothing surprises me, Mr. Roth.

Q. Well, if that safe had been furnished by Mr. Deal himself personally and had not been furnished by the Government to him, as an Inspector I will ask you to state whether or not it would have been under the same rules with reference to combination as the safe furnished by the Government?

A. It would be, yes, sir.

Q. It would be? A. Yes, sir.

Q. All right. Now supposing the Government hadn't furnished any safe at all?

A. In an office the size of Fairbanks—

Mr. CRANE.—(Interrupting.) Object to that as calling for a conclusion of the witness and improper cross-examination.

The COURT.—Objection sustained.

Mr. ROTH.—That's all.

Redirect Examination.

(By Mr. CRANE.)

Q. Mr. Fitzgerald, it is always customary, is it not, for every postmaster to sign a receipt for any

(Testimony of J. E. Fitzgerald.)

property [247—218] that is put into his hands by the lessor of the building?

A. It all depends on whether the lessor wants a receipt or not. Sometimes they do and sometimes they don't.

Q. If they do require a receipt it is the postmaster receipts for it? A. Yes, sir.

Q. And, Mr. Fitzgerald, it isn't customary, is it, for the lessors of the buildings to furnish safes to postmasters for their personal use? A. No, sir.

Q. They furnish it for the postoffice, do they?

A. Yes, sir.

Q. And the Government pays the rent, I presume?

A. Pays the rent on the building, yes, sir.

Mr. CRANE.—That's all.

Recross-examination.

(By Mr. ROTH.)

Q. Mr. Fitzgerald, do you mean to say that it is always customary for a postmaster to furnish a receipt when requested, the receipt being signed in person by him, a personal receipt?

A. What do you mean, Mr. Roth?

Q. Well, as I understand you, that you, without any qualification, stated that it was always customary, when property was furnished to a postoffice,—

Mr. CRANE.—(Interrupting.) To a postmaster, I said, Mr. Roth.

(Testimony of J. E. Fitzgerald.)

Mr. ROTH.—Well, to a postmaster, yes; all right.

Mr. CRANE.—By the lessor. [248—219]

Q. That if requested he would give a receipt for it?

A. He could sign the receipt. It all depends. The Postoffice Department wants to know what the lessor furnishes so when the lease is up and they release the building they want to know what to return to the lessor.

Q. When a postmaster furnishes a receipt for property that is delivered to the postoffice, see?

A. Yes, sir.

Q. Is it always customary for him to give a personal receipt for it or a receipt as postmaster?

A. Well it all depends. He is supposed to sign as postmaster, but it makes no difference whether it has "Postmaster" on it or without it so long as he signs it, and when it is delivered to the postoffice it is supposed to be in the custody of the United States; it is in a building occupied and the rent paid for by the United States. And in an office of this kind we don't allow outside business to be conducted in the postoffice where the Government pays the rent for it.

Q. But that is not the question and we are not asking you any question about that. But supposing that the postmaster should find that the Government hadn't furnished proper receptacles for registered mail and he should go out and procure a proper receptacle, and do it personally, do I

(Testimony of J. E. Fitzgerald.)

understand you to say that his act in doing that would put that receptacle in the possession of the Government of the United States?

Mr. CRANE.—Just a minute, Mr. Fitzgerald. We object to that as improper cross-examination; also stating a state of facts that do not exist, or assuming to state a state of facts [249—220] that do not exist.

The COURT.—Objection sustained.

Mr. ROTH.—We except to the ruling of the Court.

The COURT.—Exception allowed.

Mr. ROTH.—That is all.

(Witness excused.)

TESTIMONY OF GEORGE BENTLEY, FOR PLAINTIFF.

GEORGE BENTLEY, recalled as a witness on behalf of the plaintiff, further testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. Mr. Bentley, at the time this package was wrapped up in the bank before taking it to the postoffice who wrapped it, you or Mr. Hutchinson?

A. I believe Mr. Hutchinson wrapped it.

Q. Who got the paper to wrap it, you or Mr. Hutchinson? A. I got it myself.

Q. Were you present when it was wrapped?

A. Yes, I was.

Q. Showing you Plaintiff's Exhibit "F," I will

(Testimony of George Bentley.)

ask you if that is the kind of paper that you used in the bank that day to wrap that particular parcel in? A. Yes, I believe it is the same.

Mr. CRANE.—You may inquire. [250—221]

Cross-examination.

(By Mr. CLARK.)

Q. How was the package tied after it was wrapped, Mr. Bentley?

A. Well, I believe there was just a string put around it.

Q. What kind of string, twine?

A. If I remember rightly it was just twine, yes.

Q. And how large a package did that make, now, in dimensions?

A. Well, the dimensions was just the dimensions of a stack of bills, and with the wrapping it was probably about between two and three inches thick and was about six inches long.

Q. It would be the length of a bill and between three and four inches—and the width of the bill and between three and four inches thick?

A. Between two and three inches thick.

Q. And that was shoved right into the sack?

A. Yes.

Q. Lengthwise?

A. Of course there would be a little greater length due to the wrapping of the paper.

Q. Then the silver was put in alongside of that, was it?

A. Yes, sir.

Q. Or on the top?

(Testimony of George Bentley.)

A. I believe it was put on the side.

Q. It filled the sack up full, did it not? Made a very snug package?

A. It made a very snug package, though it wasn't stretched to any extent, however.

Q. And when you took that package did you carry it in your [251—222] hand over to the postoffice? A. Yes I did.

Q. Took it over there about noon?

A. Yes, around there.

Q. Mr. Benley, would you just look at the letter of transmittal and tell how many bills there would be in that package.

Mr. CRANE.—Objected to, if the Court please, as immaterial and improper cross-examination. I don't see how it does any harm, but it takes up a lot of time.

Mr. CLARK.—Only take a minute.

The COURT—Overruled.

A. Well, about 830.

Q. 830 bills?

A. Yes, in the neighborhood of that, as near as I can figure it out. Approximately the amount.

Q. About 830 bills stacked on top of each other?

A. Why yes.

Q. Of the 20's—

A. (Interrupting.) There were five thousand.

Q. That would be twenty-five 20's?

A. Twenty-five 20's. That would be 250.

Q. Two hundred and fifty 20's. Now ten to a hundred—there would be four hundred 10's?

(Testimony of George Bentley.)

A. Yes.

Q. And a hundred and eighty 50's?

A. Yes.

Q. And they were all stacked on top of each other?

A. Yes, and pressed down to form a fairly compact package.

Q. And then wrapped? [252—223]

A. Yes.

Mr. CLARK.—That's all.

(Witness excused.)

Whereupon an adjournment was taken until Thursday, February 19, 1925, at 9:00 o'clock A. M. [253—224]

MORNING SESSION.

Thursday, February 19, 1925, 9:00 A. M.

TESTIMONY OF G. WETZLER, FOR DEFENDANT (RECALLED—CROSS-EXAMINATION.)

G. WETZLER, recalled as a witness on behalf of the defendant for further cross-examination, further testifies as follows:

Cross-examination.

(By Mr. CLARK.)

Q. Mr. Wetzler, if any lock sacks, mail sacks, were lost in this immediate vicinity would they be reported to you? A. Yes, sir.

Q. Have you had any report of any lock sack being lost or stolen the last three or four years?

A. Yes, sir.

(Testimony of G. Wetzler.)

Q. How long ago?

A. About two years ago.

Q. Did you have any report of any before that time?

A. I don't recall of any at the present time.

Q. Can you recall now when it was reported to you that that sack was stolen or lost?

A. Which sack?

Q. The lock sack?

A. The one you have just—

Q. (Interrupting.) Yes, you said there was one reported to you about two years ago.

A. The last part of December, 1922, was a report of a locked sack lost or stolen.

Q. Was there any report of any before that date?

A. I don't recall any now. [254—225]

Q. You wouldn't say that there wasn't, would you? A. No.

Q. Where was that reported lost, from what place was it reported lost?

Mr. HURLEY.—We object to that, if the Court please, as immaterial.

Mr. CLARK.—I admit that is immaterial.

Q. You know of any sacks having been lost that were not reported to you at the time they were lost?

A. No, sir.

Q. How often do you make a check-up on the number of locked sacks there are at the different postoffices in the Territory?

A. We don't make any check-up on them.

(Testimony of G. Wetzler.)

Q. So if the postmaster does not report a lost sack to you you have no record of it?

A. We have no knowledge of it; no, sir.

Mr. CLARK.—That's all.

Redirect Examination.

(By Mr. CRANE.)

Q. Mr. Wetzler, do mail bills go with the mail just like freight bills; with all mail that goes out mail bills go with them?

A. On certain routes they do, yes, sir.

Q. Now this sack that you just referred to as being stolen, is that what is known a the Iditarod robbery that you speak of? A. Yes sir.

Q. I will ask you if in that instance it wasn't a pouch lock sack and everything that was stolen in that case? [255—226]

A. The locked pouch disappeared altogether.

Q. And state whether or not the pouch was rifled or stolen outright. A. Stolen outright.

Q. The whole works, was it?

A. Been unable to find any trace of it.

Mr. CRANE.—That's all, Mr. Wetzler.

(Witness excused.)

TESTIMONY OF JOHN NORDBYE, FOR PLAINTIFF.

JOHN NORDBYE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. What is your name?

(Testimony of John Nordbye.)

A. John Nordbye.

Q. And where do you reside, Mr. Nordbye?

A. Garden Island, Fairbanks.

Q. And where are you employed?

A. Alaska Railroad.

Q. And, Mr. Nordbye, where were you employed in the fall of 1921?

A. On the railroad, Alaska Railroad.

Q. And were you so employed on the railroad on the 16th of September, 1921?

A. Yes. [256—227]

Q. Mr. Norbye, I will ask you if you were one of the brakemen on the train on the date of the 16th of September, 1921. A. Yes.

Q. Running from Fairbanks to Nenana?

A. Yes.

Q. I will ask you whether or not that was a narrow gauge railroad? A. Yes.

Q. And approximately what were the size of the box-cars, particularly with reference to the car that carried the mail on that day?

A. The length?

Q. Just approximately?

A. About thirty feet long.

Q. About thirty?

A. Thirty feet long, yes.

Q. Mr. Nordbye, I will ask you if on that day you saw the mail on that car, the mail pouches?

A. I saw it in the front end of the car.

Q. Now, Mr. Nordbye, I will ask you if on the

(Testimony of John Nordbye.)

16th of September you, together with Brakeman Amend, closed and hooked the door upon departing from each station whereever you stopped?

Mr. CLARK.—We object, if the Court please, as calling for a conclusion and leading and suggestive.

The COURT.—It is leading.

Mr. CRANE.—I will change the form of it.

Q. On the car carrying the mail that day you may state whether or not the car doors were locked on departing [257—228] from each station?

A. Yes, it was.

Q. And you may also state whether or not upon the arrival at each station you, in conjunction with the other brakeman, unhooked and opened the doors? A. Yes, I did.

Q. I will ask you if at any time while the train was in motion between any station on the line between here and Nenana that you noticed either door of that car open? A. No.

Q. Had it been open would you have noticed it? A. I would.

Q. Mr. Nordbye, I will ask you if you had a fire on the train that day? A. Yes.

Q. I will ask you if that fire was anything unusual?

A. No. We had a fire quite often. The spark from the engine set fire quite often.

Q. You may state whether or not you were troubled all during that month with fires?

A. In the summer time, yes.

(Testimony of John Nordbye.)

Mr. CLARK.—We submit it is leading and suggestive.

A. (Continuing.) We had fires quite often.

The COURT.—Objection sustained.

Q. I will ask you, Mr. Nordbye, what were your duties as brakeman in regard to watching out and keeping close observance of the cars?

A. Well, I had to keep a close lookout.

Q. And did you on the 16th day of September, 1921, keep a close lookout? [258—229]

A. I did.

Mr. CRANE.—You may cross-examine.

Cross-examination.

(By Mr. CLARK.)

Q. Did you keep any closer lookout on that day, Mr. Nordbye, than you ordinarily did?

A. Well, always keep a close lookout.

Q. That isn't the question. On that day did you keep any closer lookout than you did any other day?

A. Well, I wouldn't say. I can't recall it, whether I did or not.

Q. You simply performed your duties as brakeman as you usually did each day, didn't?

A. Yes, sir, about, yes.

Q. Now those car doors, when they are closed there is a strap goes over, support or a staple, isn't there, then you put a piece of steel down to hook it?

A. It is a slide door and she laps over on the outside of the staple, goes over a hook, hook it in.

(Testimony of John Nordbye.)

Q. So in order to securely lock the door the strap has to be over the staple and the hook dropped down through that?

A. Yes, and the hook dropped down through that.

Q. Now do you mean to say that every time you got to a station, Mr. Nordbye, or every time you left a station that you would go around to each car and look at the lock to see whether it was fastened?

A. Well, I wouldn't say we looked at each lock especially, but you could see if it was open. We would see that the doors was closed and the hooks in there. [259—230]

Q. You would notice if the door was open?

A. I would, yes.

Q. By glancing at it. But you don't mean to say that at each station you went and looked to see particularly that the strap was over the staple and the hook was down in?

A. I didn't go around and just look that close, but you can see at a little distance, you know, that she is locked.

Q. If you were looking particularly to see you could tell at a distance of forty or fifty feet if it was locked, couldn't you? A. Oh yes.

Q. Who put the mail in the car that morning?

A. I don't know.

Q. So far as you know, you found the mail in this particular car?

(Testimony of John Nordbye.)

A. While loading freight I saw it laying in the front end just before we got through.

Q. Just before you finished loading the freight

A. Yes.

Q. The mail was there. So the mail had been put in before you completed loading that car, had it?

A. The mail was put in before we finished loading, yes, just about the last—when I put in the last load I think I noticed it then.

Q. You noticed the mail there? A. Yes.

Q. And it was up at the front end of the car?

A. It was right close to the door in the front end, yes.

Q. Was there any freight in the neighborhood around close [260—231] to where the mail was?

A. It was laying on top of the freight.

Q. And was the freight at the other end of the car? A. Yes, on both ends.

Q. And that was what was known as your way car, wasn't it? A. It was a way car.

Q. And when you got to a station if you had any freight to take out it came out of that particular car? A. We had freight out of both cars.

Q. Oh, you had freight from both cars for delivery that day along the road? A. Yes.

Q. So sometimes you would be putting freight out of one car and sometimes out of the other?

A. Yes.

Q. Or out of both cars at the same time?

A. Sometimes, yes.

(Testimony of John Nordbye.)

Q. When you came to a station or any place where you had to unload freight, the man to whom the freight was consigned, or someone assisting him, sometimes came in the car and helped to unload the freight, didn't they?

A. No, they never come in the car.

Q. Don't you occasionally, in unloading the freight, doesn't some outsider come in and help you?

A. We never ollow anybody in the cars.

Q. Never allow anybody in the cars?

A. No, not when I am on. One of us goes in the car and unloads the freight and the other fellow, he stands on the ground and see it is put on the ground.

Q. So you permit no one else in the car?

A. Not necessary for anybody to go in there.

[261—232]

Q. Well, that isn't the question. Do you permit anybody else in the car to assist in unloading freight?

A. No, we don't permit any in the cars.

Q. Not at any time?

A. I never saw any in there. I had nothing to do with preventing them, but the conductor is always there, has to check up, and he wouldn't allow anybody.

Q. Who wouldn't allow anybody?

A. The conductor. He is always there to check up.

Q. So you want us to understand that no one is

(Testimony of John Nordbye.)

permitted in the car except the brakeman, no matter what kind of freight you are unloading?

A. Yes, as far as I remember we don't allow any in the cars.

Q. You didn't pay any particular attention to the mail that morning, did you? A. No.

Q. The only reason that you recall the mail at all is because of what happened that day and your attention was called to it that evening or the next day, isn't that true, Mr. Nordbye?

Mr. CRANE.—I object to that as improper cross-examination.

The COURT.—Objection overruled.

Q. Isn't that the fact, Mr. Nordbye, that you wouldn't have paid any attention to the mail or wouldn't have given it any further thought, only something happened to the registered mail on that trip?

A. I suppose. I never paid that close attention to the mail, except before we leave I always see that we have the mail along. [262—233]

Q. Do you remember how many sacks of mail were in the car that morning?

A. No, I don't remember.

Q. Well, can you tell us approximately?

A. I could not. I know it wasn't very many. Might have been a half a dozen. I don't know.

Q. And you had certain freight piled up near one end and this mail was on top of that?

A. Yes.

Q. In loading your freight in the car how do

(Testimony of John Nordbye.)

you load it? The freight that is to go out first is loaded closest the door, isn't it? A. Yes.

Q. And that that goes to the end of the run is put back at the ends of the car? A. Yes.

Q. So that it will be convenient to unload as you go along? A. Yes.

Q. And this mail was put on top of the freight that was probably going the furthest?

A. Going to Nenana, yes.

Q. Now from the time the mail was loaded into that car over here at the depot, Mr. Nordbye, how long would you say it was before the train actually pulled out that morning?

A. That I couldn't remember.

Q. Did you load any freight after the mail was put in?

A. No, not after I saw it there. That was the last trip in there, as far as I remember.

Q. But what you mean to say is your last trip in with the freight you noticed the mail in there? [263—234] A. Yes.

Q. And the car at that time was over next to the old McFarlane warehouse on the west side of the yard, wasn't it? A. The car was what?

Q. The car, when you were loading it, was over next to the old McFarlane warehouse on the west side of the yard, wasn't it?

A. Yes, the warehouse.

Q. Well, the old timers here refer to it as the McFarlane warehouse. Then before the train left Fairbanks it had to be pulled forward and back

(Testimony of John Nordbye.)

down onto the main track in front of the depot, didn't it? A. Yes.

Q. And you don't know how long it was from the time they completed loading this car until the train actually pulled out and started to Nenana?

A. Well, as a rule—

Q. (Interrupting.) No, that particular morning?

A. Oh, I couldn't say that.

Q. And you don't remember anything further about the mail that day except that you saw it there when they pulled out from Fairbanks?

A. That's all I remember.

Q. And you remember the fire, of course, that morning and everybody fighting the fire?

A. Yes.

Q. A good deal of smoke around there, wasn't there? A. Well, from the car, the smoke.

Q. Which car was this mail in as regards the gondola of wood that was on fire? [264—235]

A. It was next to the car afire.

Q. What kind of freight was in that particular car?

Mr. CRANE.—Object to that as improper cross-examination and immaterial.

The COURT.—Overruled. You may answer if you know.

A. In that car?

Q. Yes, where the mail was stored?

A. Groceries.

Q. You helped put out the fire, didn't you?

A. Yes.

(Testimony of John Nordbye.)

Q. When the car first stopped after the fire was discovered in the bottom of the gondola you went forward and helped put out the fire?

A. Yes.

Q. Was all the train crew working there throwing water on it and trying to stop it?

A. Yes, they were all there.

Q. And quite a little excitement around there at the time, wasn't there? A. Yes.

Q. And two or three people got up on top and threw the wood out on the ground? A. Yes.

Q. And many of the passengers were up front there helping, were they not, or around there?

A. They helped pass the bucket, formed a bucket line there.

Q. Where did you get the water?

A. From Little Goldstream.

Q. That is after it ran down—that was the second stop, wasn't it, when you went down to Goldstream?

A. Well, that was only a couple of hundred feet or so from [265—236] the bridge.

Q. Then you first stopped and tried to put it out and then ran down to Little Goldstream, did you?

A. Pulled up, yes.

Q. And everybody was busy until the fire was out? A. Yes.

Q. The mail, when delivered in the car that morning, it wasn't delivered, actually delivered right to you, was it? A. No, sir.

(Testimony of H. J. Amend.)

Mr. CRANE.—Object to that as a repetition, if the Court please, and improper cross-examination.

The COURT.—Objection sustained.

Mr. CLARK.—That's all.

(Witness excused.)

TESTIMONY OF H. J. AMEND, FOR PLAINTIFF.

H. J. AMEND, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. Your name is H. J. Amend? A. It is.

Q. Where do you reside, Mr. Amend?

A. At present at Nenana.

Q. And what is your occupation?

A. At present conductor on the Alaska Railroad. [266—237]

Q. Mr. Amend, were you working for the Alaska Railroad in September of 1921? A. I was.

Q. What was your position with the Alaska Railroad at that time? A. Brakeman.

Q. Mr. Amend, were you one of the brakemen on the train running from Fairbanks to Nenana that left Fairbanks on the 16th of September of 1921? A. I was.

Q. As brakeman on that train, briefly state what your duties are as regarding keeping close watch over all cars and seeing that the doors are closed or open?

(Testimony of H. J. Amend.)

A. We got to see that the train is in safe condition to run, see that the doors are all closed in the cars, see there are no cars on fire, or anything like that; unload and load freight, assist the conductor in whatever duties he assigned us to do.

Q. Mr. Amend, before leaving the station what do you do with reference to the doors on the box-cars, if anything?

A. We see that they are closed and securely hooked at all times.

Q. Did you do that on the 16th of September, 1921? A. I did.

Q. Mr. Amend, had the doors of the coach carrying the mail been opened, the box-car, rather, carrying the mail anywhere en route while the train was in motion, would you have noticed it?

A. I would.

Q. Did you notice the doors of that box-car open at any time between stations on that date? [267—238] A. I did not.

Q. Did you notice the doors of that coach open at any time except when you or Mr. Nordbye opened it? A. I did not.

Q. I will ask you if there was a fire between here and Nenana that day? A. There was.

Q. I will ask you whether or not that was the first fire on that run? A. It was not.

Mr. CLARK.—We submit that is immaterial, if the Court please.

The COURT.—Overruled.

(Testimony of H. J. Amend.)

Q. You may state whether or not it was usual to have fires on that run at all times?

A. It was. We had fires every day.

Q. I will ask you, Mr. Amend, if a person inside of a box-car with the door closed, that box-car with the door hooked and closed on the outside, if it would be possible to get out while the train was in motion?

A. It would by breaking the end of the car out, the side of the car out some way or other, but it would be impossible for him to unhook the door if he was in and the door was hooked.

Q. And did you see anyone in that car that day besides yourself and Mr. Nordbye?

A. I don't even remember anybody being in that car except myself to load freight.

Mr. CRANE.—You may inquire. [268—239]

Cross-examination.

(By Mr. CLARK.)

Q. Between stations, Mr. Amend, where do the brakemen ordinarily ride?

A. As a rule the head brakeman rides in the engine and the rear brakeman rides in the coach.

Q. They are not out patrolling the top of the train or anything of that kind?

A. At times they go over the top of the train. In this particular instance Mr. Nordbye had gone over the top of the train to the engine.

Q. You were noticing that day on account of fires?

A. We were. We look for fires at all times.

(Testimony of H. J. Amend.)

Q. Now was there any particular reason, Mr. Amend, for making any special examination of cars that day any more than any other day?

A. There was not.

Q. You had certain duties to perform as brakeman and you went ahead each day and performed them in practically the same way? A. We did.

Q. On that day did you make any special examination of the locks of those cars, those two boxcars, whenever you arrived at a station, or did you merely examine them in the way you ordinarily examine them each day?

A. We made no special examination at no time, but it is drilled into us to watch those doors, and we do that at all times.

Q. Your instructions are to watch them and see they are closed so that the freight—they won't jar open and the freight tumble out? [269—240]

A. If the door was open it would fall off, the motion of the train, the door would fall off.

Q. The door would slide clear back and fall off?

A. No, it would just jump off of the roller it is on.

Q. There is no seal put on those cars because you are taking freight out of them at the different stations? A. No seals; no.

Q. And you state that you are the one that put the freight out of that particular car that day so far as you remember?

A. So far as I remember I am the only one that was in the car en route.

(Testimony of H. J. Amend.)

Q. Do you know how long the car was standing on the track over here at the depot from the time it was loaded until the train pulled out?

A. I do not.

Q. There was nothing unusual occurred that day so far as your regular routine work was concerned to cause you to do anything different as regarding your duties than any other day, was there, Mr Amend?

A. No, not except this fire. We had that fire. That was unusual. It was an unusually big fire.

Q. Well, in addition to your multitude of other duties as a brakeman you are sort of a fire-fighter, too? A. Well, yes, in a way.

Q. At the time when the fire came along all the train crew helped in trying to put out the fire?

A. Train crew and including the passengers, they all get out, help.

Q. They come forward, and those who could assisted you? A. They did. [270—241]

Q. And then the car ran down a short distance to Little Goldstream after the first stop, and there is where you got your syphon to work and put out the fire? A. We did.

Q. How far was it from the place where you first stopped to fight the fire down to Little Goldstream?

A. Well, I couldn't say. I don't just exactly remember, but it seems to me the distance is about between two and three hundred feet, something like that.

(Testimony of H. J. Amend.)

Q. Did the train—

A. (Interrupting.) I won't say for sure now.

Q. Did the train run fast that distance?

A. Oh, no.

Q. Or slow to keep from fanning?

A. It run slow; it was just moving ahead.

Q. So there wouldn't be any fanning of the flames?

A. Well, you couldn't run fast and stop. Couldn't get any speed in that distance.

Mr. CLARK.—That's all.

(Witness excused.)

TESTIMONY OF EVALYN HOUCK, FOR PLAINTIFF (RECALLED).

EVALYN HOUCK, recalled as a witness on behalf of the plaintiff, further testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. Miss Houck, I will ask you, at the time you were employed in the postoffice for Mr. Deal whether or not [271—242] you were under bond?

A. We just took the oath of office and we signed our regular oath of office. Just a regular oath of office blank; we just signed that.

Q. But did you give any bond?

A. No, we didn't.

Mr. CRANE.—That's all.

(Witness excused.)

TESTIMONY OF P. L. NEIL, FOR PLAINTIFF.

P. L. NEIL, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. State your name. A. P. L. Neil.

Q. What is your occupation, Mr. Neil?

A. Postoffice Inspector.

Q. Mr. Neil, how long have you been a Postoffice Inspector? A. Twenty years or more.

Q. Mr. Neil, when did you first come to Alaska on inspection service? A. 1909.

Q. And you have been continually coming since that date, have you?

A. Not every year, but irregular. Most every year, I believe. [272—243]

Q. Mr. Neil, are you familiar with the postoffice at Fairbanks, Alaska? A. Yes, I am.

Q. And were you familiar with it in 1921?

A. I wasn't here in 1921. I was here in '22.

Q. Do you know whether or not in 1921 the postoffice at Fairbanks, Alaska, was a second-class postoffice? A. It was.

Q. Mr. Neil, referring to the safe known as the small safe in the postoffice, did you measure that safe? A. I did.

Q. Give us the dimensions of it, will you?

A. Well, I will have to look at it because I measured it this morning. (Witness produces and

(Testimony of P. L. Neil.)

looks at paper.) The safe is 50 inches high, 40 inches wide and 36 inches deep on the outside measurement.

Q. Mr. Neil, I will ask you whether or not the postoffice at Fairbanks, Alaska, is furnished with postal laws and regulations, together with their amendments and supplements, or not? A. It is.

Q. I will ask you if at the time Mr. Deal was postmaster, during his administration as postmaster, if they were furnished with the postal laws and regulations? A. Yes, sir.

Q. I will ask you if you have there with you the postal laws and regulations of 1913 that was furnished the postoffice at Fairbanks, Alaska, and if so, where did you get them?

A. Yes, I have them. I got them from the Fairbanks, Alaska, postoffice. [273—244]

Q. Is that the same regulation that was furnished Postmaster Deal?

A. It is the same book.

Q. Mr. Neil, I will ask you, referring to the postal laws and regulations that you have there, I will ask you to read what the regulation is regarding the changing of combinations on safes, and furthere in regard to leaving the safe on day combination, and by what regulation is that covered?

A. This is section 361 of the Postal Laws and Regulations of 1913. I might say that this edition of the postal laws and regulations were published in 1913. Since that time we have had a new edition in 1924. Section 361 relates to the care of public

(Testimony of P. L. Neil.)

funds and property; safes to be completely locked, combinations of safes to be changed, and a penalty for failure, or, rather, to make such changes.

Mr. CLARK.—We object to that last statement of Mr. Neil's because there is no provision there for penalty at all, and we ask that part be stricken.

The COURT.—That may be stricken.

The WITNESS.—I will correct that, yes.

Q. You may read it.

A. Section 361 of the 1913 Postal Laws and Regulations—

Mr. CLARK.—Just one moment before you read that, if the Court please. We object to this testimony for the reason that the complaint does not specify the particular acts of negligence, alleged negligence, relied upon by the Government; that it does not specify [274—245] specifically what particular violation or breach of duty was relied upon by the Government as the basis for this action, and that this section is irrelevant, incompetent and immaterial for that reason.

Mr. ROTH.—And on the further ground, if the Court please, that the complaint in this case, the second amended complaint, does not set forth specifically what of the many provisions of section 361 constitutes the claimed act of negligence.

The COURT.—The objection will be overruled.

Mr. ROTH.—Exception.

The COURT.—I will call attention now to defendants' counsel that only one attorney should make objections hereafter. Exception allowed.

(Testimony of P. L. Neil.)

Q. Go ahead and read it.

A. "Section 361: Postmasters must exercise all possible care for the protection of the public funds and property in their custody.

"If the postoffice is not such a reasonably safe place as to warrant the postmaster in leaving his own funds in it at night, or when the building is unoccupied, all moneys and postage stamps should be removed to a place of greater security. During business hours money and postage stamps should be kept in places inaccessible to the public and concealed from view.

"When funds or postage stamps are left at night in offices unprovided with iron safes, they must be kept in strong drawers or other fixed receptacles, [275—246] which must be securely fastened with good locks. The doors and windows of the office should be made as secure as possible. The same precautions shall be taken when the postoffice is closed temporarily during the day.

"Where stamps and funds are kept in iron safes with 'combination locks,' such safes shall be carefully and completely locked at night or when the office is left without occupants. No credit will be allowed for losses from safes fastened only with what is termed a 'day lock' or 'day combination.'

"A postmaster upon taking charge of his office shall immediately change the combination on every safe therein; and where at any time a safe is procured, either new or second-hand, he shall immediately change the combination. Failure to

(Testimony of P. L. Neil.)

make such change shall be considered as *prima facie* evidence of contributory negligence on the part of the postmaster in any case where claim is made for credit for money or other property stolen from such safes which have been opened without resort to violence."

There is no amendment to that section, I might say.

Q. I will ask you, Mr. Neil, if you have with you the regulation regarding the permitting of unauthorized persons in the work-room of the postoffice? Have you that regulation?

Mr. CLARK.—We object, if the Court please, unless it is confined to one of the postal regulations which they have pleaded here as having been violated. Under the Court's ruling they will undoubtedly introduce the four different [276—247] regulations that they have pleaded, but we object to any evidence concerning any others except those four that are pleaded.

The COURT.—Objection overruled.

Mr. CLARK.—We note an exception.

The COURT.—Exception allowed.

Q. Go ahead, Mr. Neil.

A. Do you wish me to read it?

Q. Yes, sir.

Mr. CLARK.—Which section is it?

A. Section 524 of the Postal Laws and Regulations of 1913 are as follows: "Postmasters shall not permit any persons except duly sworn assistants, clerks, letter carriers, and postoffice in-

(Testimony of P. L. Neil.)

spectors or other authorized representatives of the department to have access to any mail matter in the postoffice. This prohibition extends especially to mail contractors and their drivers.

"Mails should not be made up or handled within reach of unauthorized persons, and such persons should be excluded from the room appropriated to the use of the postoffice while the mails are being opened or made up.

"An ex-postmaster shall not be permitted—"

Mr. ROTH.—What are you reading from now?

The WITNESS.—The same section.

A. (Continuing.) "An expostmaster shall not be permitted to have access to or handle mail unless he takes the oath of office anew.

"Postmasters shall always require postoffice inspectors to exhibit their commissions before being [277—248] admitted to the postoffice, in order to avoid imposture, unless such officers are personally known to them."

Q. Mr. Neil, I will ask you, referring to the Postal Laws and Regulations of 1913, I will ask you to turn to section 940 and read that.

A. Section 940 of the 1913 Postal Laws and Regulations is as follows: "Postmasters and other postal employees will be held personally responsible by the Postoffice Department for the wrong delivery, depredation upon, or loss of any registered letter or parcel if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations."

(Testimony of P. L. Neil.)

Q. Mr. Neil, have you the regulation there regarding the sealing of jackets? A. Yes, I have.

Q. Or regarding the Alaska registered jacket service. What is the number of that? A. 1015.

Q. Will you read it?

A. Section 1015 of the 1913 Postal Laws and Regulations is as follows:—

Mr. ROTH.—(Interrupting.) We object to that on the ground the same is irrelevant, incompetent and immaterial; that it is not a section that conforms to the proof that has been offered with reference to the amount of registered packages; that it is not alleged in the complaint; that is, there is no specific act alleged in the complaint that would warrant the introduction of the particular regulation in question. [278—249]

The COURT.—Objection overruled.

Mr. ROTH.—Exception.

The COURT.—Exception allowed.

Q. Go ahead and read it, Mr. Neil.

A. "Postal employees shall use registered paper jacket envelopes in the dispatch of five or more separate registered articles addressed to or intended for distribution by the same postoffice, railway postoffice, or transfer clerk, when at least one record and handling of the articles in transit will thereby be saved.

Paragraph 2: "Postmasters at offices in Alaska are authorized to use registered paper jacket envelopes in the dispatch of one or more letters and

(Testimony of P. L. Neil.)

small sealed parcels, when the method of handling the registered matter in transit or the conditions of its transmission justify the use of jackets in order to give greater protection to the mail.

Paragraph 3: "When applicable to rules governing rotary-lock pouches and sacks shall be observed in the opening and closing of registered jacket envelopes; in other respects the treatment of the jacket envelopes shall be as prescribed for registered letters and parcels, except as modified herein."

Q. Mr. Neil, has that section been amended, or do you know? A. No, not to my knowledge.

Q. Calling your attention, Mr. Neil, to Regulations 317 and 318, I will ask you what they cover?

Mr. CLARK.—If the Court please, we object. They [279—250] are not pleaded or set forth in the complaint. There is absolutely no allegation set forth in the complaint referring to them or anything based upon it.

The COURT.—Objection overruled.

Mr. CLARK.—Exception.

The COURT.—Exception allowed.

A. The number of that, please?

Q. It is Regulation 317 and 318.

A. Section 317 of the 1913 Postal Laws and Regulations relates to the liability of a postmaster not affected by taking bonds from clerks.

Q. Will you read that regulation?

Mr. CLARK.—To which we object, if the Court

(Testimony of P. L. Neil.)

please, as no foundation laid, not within the issues in this case, and absolutely no basis in the second amended complaint for the introduction of any regulation except the four that have been pleaded, and this is a variance from the allegations of their complaint.

The COURT.—Objection overruled.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

A. Section 317 of the 1913 Postal Laws and Regulations provides that: "The taking of bonds by the United States directly from assistant postmasters and clerks in postoffices does not in anywise affect the liability of postmasters upon their official bonds for the proper discharge of all the duties of their office and the due accounting for all public funds which may be in, or come into, their custody as postmaster; and [280—251] postmasters and their sureties are responsible on their official bonds to the same extent as theretofore for the defaults and defalcations of their subordinates. The bonds taken from assistants and clerks in postoffices are simply additional security of which the United States may avail itself in case of loss."

Q. Now, Mr. Neil, I will ask you if clerks in the postoffices handling—

A. (Interrupting.) I didn't read 318. Do you want that?

Q. I will ask you if there is a regulation pro-

(Testimony of P. L. Neil.)

viding, in second-class postoffices, clerks handling mail, stamps or valuable packages shall be bonded?

Mr. ROTH.—We object to that as incompetent, irrelevant and immaterial, no proper foundation and not within the issue of this case.

The COURT.—Overruled.

Mr. ROTH.—Exception.

The COURT.—Exception allowed.

A. Section 318 of the 1913 Postal Laws and Regulations provides as follows: "All employees of first and second class postoffices who handle money, stamps, or valuable packages, and assistant postmasters at first, second, and third class offices shall furnish bonds executed to the United States in accordance with the forms prescribed by the department.

"The bonds given to the United States by clerks and employees in postoffices under their roster designation shall apply to and cover the faithful discharge of all duties and trusts imposed upon them, and the due accounting of all moneys which may come into their possession while performing the duties of any [281—252] other clerk or employee, or of any position under any other roster designation or classification whatever.

"The amount of bond in each instance shall be fixed by the Postoffice Department, upon the advice of the postmaster, according to a schedule printed in the annual Postal Guide.

"It is preferred that bonds furnished by one

(Testimony of P. L. Neil.)

of the surety companies authorized to act as sureties on official bonds be given.

"Postmasters may represent the employees of their offices in negotiating premium rates with surety companies, but shall not solicit or accept commissions from such companies, nor seek to compel their clerks to do business with any particular company.

"The premium on bonds shall be paid by the employees furnishing them. Postmasters shall report to the First Assistant Postmaster-General, Division of Salaries and Allowances, the failure of any employee to pay the premium on his bond within 15 days after it is due.

"Applications for forms for bonds and lists of surety companies that will be accepted thereon, and all correspondence relative to bonds of clerks or assistant postmasters, should be addressed to the First Assistant Postmaster-General, Division of Salaries and Allowances.

"Bonds of assistant postmasters and clerks in postoffices may be accepted by the First Assistant Postmaster-General for and on behalf of the Postmaster-General, and shall be filed in the office of the First Assistant Postmaster-General, Division of Salaries and Allowances." [282—253]

Q. I will ask you, Mr. Neil,—

A. (Interrupting.) Wait a minute. This section 318 was amended on May 1, 1916. Now I will state in the matter of the

(Testimony of P. L. Neil.)

amendment. In 1913 the Postal Laws and Regulations, this edition, was published, and each month there is a monthly supplement to the annual Postal Guide in which the Postmaster-General prints the amendment to the Postal Laws and Regulations. The Postmaster is required to cut those out and paste them into the Postal Laws and Regulations over the particular section amended. On May 1, 1916, section 318 of the 1913 Postal Laws and Regulations was amended as follows:

"Section 318, Postal Laws and Regulations, is hereby amended by the addition of the following paragraph:

9. It is the duty of the postmasters of all classes to see that only clerks and employees who are under bond are permitted to handle money, stamps and registered mail, and postmasters will be held responsible for any losses of such matter chargeable to an unbonded employee entrusted with such matter in disregard of this provision."

I mention that is in small print and I had to go a little slow.

Q. Mr. Neil, I will ask you if you have a regulation regarding postal employees being prepared at any time to make affidavit as to particular pieces of mail, particularly section 898? If you have such regulation I will ask you to read 896 and 898 both. A. Yes, we have. [283—254]

Mr. ROTH.—We object to that, if the Court please, upon the ground the same is irrelevant, in-

(Testimony of P. L. Neil.)

competent and immaterial, that it is not pleaded in the complaint, and there is no statement of fact set forth in the complaint that covers the section called for, and that it is in no way involved in the issues made up by the pleadings in this case.

Mr. CRANE.—If counsel will carefully read paragraph 10 of the complaint you will be familiar with that.

The COURT.—The objection will be overruled.

Mr. ROTH.—Exception.

The COURT.—Exception allowed.

A. Section 898 of the 1913 Postal Laws and Regulations provides as follows:

"Postal employees shall be prepared at any time to make affidavit that any particular registered piece, jacket, sack, or pouch was either given to another employee of the postal service or left the office in a pouch properly locked and labeled, and was sent by the proper route. When practicable, two persons should be present at and witness the pouching of the dispatch, and also the receipt of registered mail, and write their names or initials as evidence thereof in the transit, delivery or other proper record. In dispatching registered with ordinary mail, the registered matter should be placed in the pouch last, just before the pouch is locked and delivered to the person authorized to receive it."

That is paragraph 1. Well, I will read the whole [284—255] paragraph, I mean the whole section.

"In dispatching and delivering registered mail it shall be arranged, as far as possible, in the order

(Testimony of P. L. Neil.)

in which it is entered on the dispatching record or accompanying registered-package receipt or manifold bill."

Q. Calling your attenion to Regulation 896, I would like for you first to read that regulation and then demonstrate, if you can what is meant by it.

Mr. CLARK.—Now, if the Court please, we object as incompetent, irrelevant and immaterial, not within any of the issues of the case, not one of the sections specifically mentioned, and is a variance from the allegations of their complaint and an attempt to prove something that is not set forth in the complaint.

The COURT.—I will sustain the objection on the ground that the witness should not be required to demonstrate the meaning of the section, but he may read it.

Mr. CLARK.—We note an exception to the latter part of the Court's ruling.

The COURT.—The exception will be allowed.

Q. Just read the section, then, Mr. Neil.

A. Section 896 of the 1913 Postal Laws and Regulations provides that:

"Registered matter and package receipts shall not be dispatched in a newspaper or tie sack, except when the use of lead-sealed sacks is specially authorized.

"When dispatched in iron-lock or brass-lock pouches, registered matter shall be tied with the [285—256] ordinary mail, whenever practicable, and placed on the top of the local of No. 1 working

(Testimony of P. L. Neil.)

package, immediately under the facing slip, together with the registered package card, receipt, or sheet bill. Registered mail shall not be included in city packages unless inclosed in a direct pouch for the city addressed, nor in State packages. When there is special delivery mail and registered mail for dispatch at the same time, the former should be placed immediately under the facing slip on top of the latter.

"The word 'Registered,' in bold letters, shall be plainly stamped or marked on the facing slip covering the package containing the registered matter.

"Registered matter that cannot be tied with the ordinary mail should not be inclosed, if possible, in unaddressed, unnumbered, and unsealed registered jacket envelopes, used merely as containers for small registered parcels that might become mislaid; otherwise the registered articles should be placed loose in the pouch."

Q. I hand you the Postal Guide of 1914. Referring to the Postal Guide of 1914, Mr. Neil,—I will ask something preliminary to that. Do you know, Mr. Neil, when Mr. Deal was first appointed postmaster? A. June 29, 1914.

Q. Have you the 1914 Postal Guide there?

A. This is the only Postal Guide, of July 1st, 1914.

Q. Calling your attention to page 83, I will ask you if it provides on page 83, I believe it is section 84 on that page, regarding the sealing of regis-

(Testimony of P. L. Neil.)

tered jackets, if there is a regulation there? [286—257] A. Yes.

Mr. CLARK.—We object on the ground it is incompetent, irrelevant and immaterial. They are attempting to prove something from the Postal Guide. No allegation, no reference made to the Postal Guide in the complaint, no allegation that there is any violation of anything except the regulations, a complete variance from the allegations of the complaint, and absolutely no foundation laid for it, nothing to show in their bond that they are governed by the rules of the Postal Guide. All that the bond provides is they shall obey the law and the regulations. Now they are attempting to prove something here that isn't referred to in their complaint, and we object for that reason.

The COURT.—The objection will be overruled.

Mr. CLARK.—We note an exception.

The COURT.—Exception allowed.

Q. Go ahead, Mr. Neil.

A. Paragraph 84 of the July 1st, 1914, Postal Guide provides as follows:—

Mr. CLARK.—(Interrupting.) One moment. We further object, if the Court please, it isn't shown that a copy of this Postal Guide was furnished to the postmaster and that he had no knowledge of it.

Mr. CRANE.—Mr. Neil testified that the postmaster was furnished with the Laws and Regulations, together with the Postal Guides and the amendment [287—258] thereto, and I have

(Testimony of P. L. Neil.)

shown Mr. Deal was postmaster at this time. However, I can ask him the question again if the Court wishes me to.

The COURT.—The objection will be overruled.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

A. (Reading:) "It is noted that in some instances registered paper jackets have not been securely sealed. All postal employees making up such jackets will see that all of the gummed surface is properly moistened and the jackets securely sealed. In sealing the jackets extreme care should be taken to avoid removing the mucilage from the sealing flap in moistening. Before moistening the gummed surface of the sealing flap that portion of the jacket which will be covered by the flap should be moistened, which will render the paper more porous and tend to secure a more satisfactory sealing. Jacket envelopes must be kept where they will not be subjected to excessive dampness or heat."

Mr. ROTH.—If the Court please, we move to strike this last answer on the ground and for the reason that, as stated by the witness, that it is contained in the Postal Guide of 1914, whereas, the Government has introduced in evidence here section 896 of the Postal Laws and Regulations of 1913 which have set aside and repealed the regulation read by the witness at this time.

Mr. CRANE.—If the Court please, 1913 can't set

(Testimony of P. L. Neil.)

aside and repeal the 1914 regulation. Counsel [288—259] should know that.

Mr. ROTH.—But that is a Postal Guide and this is a postal regulation.

The COURT.—The objection will be overruled.

Mr. ROTH.—Exception.

The COURT.—Exception allowed.

Q. Mr. Neil, have you the 1920 Postal Guide?

A. I have.

Q. I will ask you where you got that Postal Guide?

A. Out of the Fairbanks, Alaska, postoffice.

Q. I will ask you if that Postal Guide was furnished to Mr. Deal while he was postmaster?

A. It has Mr. Deal's signature on the face of it, cover of it.

Q. All right. Turning to page 99 of that Guide, paragraph 20, I believe it is, I will ask you if that is an amendment to a regulation, or a later regulation, and if so what it provides?

A. Paragraph 20 of the July 1st, 1920, Annual Postal Guide provides as follows:—

Mr. ROTH.—One moment. Is that an amendment to a regulation?

A. That is a regulation of the postmaster-General, instructions how to conduct the postal service.

Q. Is that a later regulation than the 1913 regulation? A. It is.

Mr. ROTH.—Then, if the Court please, we object as irrelevant, incompetent and immaterial, and no

(Testimony of P. L. Neil.)

foundation laid, is a variance from the allegations of the complaint, it is not pleaded in the second amended complaint, it is not set [289—260] forth as a basis for any alleged negligence on the part of the defendant in this case.

The COURT.—Objection overruled.

Mr. ROTH.—Note an exception.

The COURT.—Exception allowed.

Q. Go ahead and read it.

A. "Registered articles known or presumed to contain large values, such as coin, currency, securities, etc., to be made the object of special care, in so far as practicable, both at postoffices and while in transit. Such articles, as far as practicable, should be given proper vault or safe protection, handled under the supervision of responsible supervisory officials or employees, and such receipts should be taken, and care exercised in billing and checking as will make it possible to place responsibility in cases of loss or depredation. At massing points in large offices or large R. P. O.'s, where the ordinary run of registered mail is, in special cases, transferred by bulk, exception should be made, in so far as practicable, to articles apparently of large value and detailed receipt obtained for such mail. Day R. P. O. dispatches of registered mail of large value as preferable to night dispatches and in so far as practicable postmasters should advise the senders of such matter to present it, if possible, in time for inclosure in day R. P. O. dispatches.

"Prompt report should be made to the Depart-

(Testimony of P. L. Neil.)

ment, through proper channels, of any instance noted where it is believed that registered mail—particularly that known to be of more than nominal value—is not [290—261] given adequate safeguards either in transit or in postoffices."

Q. Now, Mr. Neil, coming to the question of postoffice locks and keys, I will ask you whether or not in the case a key is lost if an investigation is made?

Mr. ROTH.—We object to that on the ground the same is irrelevant, incompetent and immaterial, it is not within the issues in this case, there is no basis for the introduction of the testimony on any allegation of the complaint, and the testimony would have no binding effect upon the defendants in this case for that reason.

The COURT.—I think that would probably be rebuttal testimony, but I can't see its materiality at this time?

Mr. CRANE.—Very well.

Q. Mr. Neil, I will ask you if you made a demand upon the bonding company, the defendant in this case for the amount claimed?

Mr. CLARK.—That is conceded [illegible] admitted by the pleadings.

A. Yes.

Mr. CRANE.—You may cross-examine.

Cross-examination.

(By Mr. CLARK.)

Q. You have made a number of visits to the postofficer here, haven't you, Mr. Neil?

(Testimony of P. L. Neil.)

A. Yes, sir.

Q. At various times. Part of your duty to inquire into [291—262] how the different postoffices are being conducted, isn't it?

A. When I visit them, yes.

Q. Your duty as Inspector is to inspect and ascertain whether or not the business is being properly conducted, isn't it, Mr. Neil?

A. Yes.

Q. When you go into a postoffice you are supposed to ascertain whether or not the postmaster is conducting the business as prescribed by law and the regulations, aren't you? A. Yes.

Q. Before 1921 how many visits had you made to the Fairbanks postoffice, Mr. Neil. A. Two.

Q. What years were those?

A. 1909 and 1910, the summer of both years.

Q. That was before Mr. Deal's term as postmaster, was it? A. Yes, sir.

Q. Then your next visit to the Fairbanks postoffice was after this depredation upon this registered package? A. In 1922; yes, sir.

Q. There are different subjects, different divisions of the postal regulations, are there not, Mr. Neil, dealing with different subjects; that is, one the money order system and the other the registry system, and the other public funds and savings system, and such things at that?

A. The regulations, or the sections of the regulations all route under the different headings. Those that relate to money orders would be grouped

(Testimony of P. L. Neil.)

together, and [292—263] those that relate to registered mail would be grouped under the general heading of Registered Mail.

Q. Now, Mr. Neil, in transmitting mail between here and Nenana the postmaster, in transmitting registered mail, I mean, the postmaster was permitted to use iron-lock pouch, wasn't he?

A. Yes, he was instructed to.

Q. Yes. So, in transmitting that registered mail in the iron-locked pouch, that was according to instructions? A. Yes.

Q. Now, Mr. Neil, they had two registered articles. The evidence here shows there were two registered articles to be transmitted to Nenana on the 16th day of September, 1921?

A. That appears to be the record. I wasn't here, of course, at that time.

Q. But all the evidence has shown there was a letter and this particular parcel? A. Yes, sir.

Q. You have heard the testimony in regard to how that package was made up, haven't you, Mr. Neil? A. Yes, I have.

Q. Yes, you have heard. Wherein was the particular method of sending that package at variance with the regulations of the Postoffice Department?

A. In making up the package at night, as Miss Smith testified she made it up,—

Q. (Interrupting.) No, I am referring to the jacket and the container. We will take that first. Where did the method of putting it into the—method of sending it in the container that way,

(Testimony of P. L. Neil.)

where did it violate the [293—264] postal regulations?

Mr. CRANE.—Object as not proper cross-examination.

The COURT.—Objection sustained.

Mr. CLARK.—Does the Court mean that we can't ask him anything in connection with the post-office regulations?

The COURT.—His opinion isn't material. We are hearing all the testimony on the subject here, and it is for the jury to determine whether he has violated any of the postal laws and regulations or not.

Mr. CLARK.—Well, we note an exception, if the Court please.

The COURT.—Exception allowed.

Mr. CLARK.—No further questions.

Redirect Examination.

(By Mr. CRANE.)

Q. One question, Mr. Neil. I will ask you if you know whether or not the postal employees, the clerks in the Fairbanks office are under civil service or not. A. They are not.

Q. They are not? A. No.

Q. They are personal appointees, are they?

A. The postmaster is permitted to select and appoint anyone as an employee in the Fairbanks office whom he chooses to appoint.

The COURT.—You are referring now to the condition at this time or prior to September 15, 1921?

(Testimony of P. L. Neil.)

A. That has been true since the Fairbanks has [294—265] been established in, I think, 1902 or '3 There have been no restrictions on the appointment of employees in the Fairbanks office since its establishment. The same condition prevails now that prevailed in those years. The name of the employee must be reported to the Department, but the selection of the employee is left entirely with the postmaster. The same is true of their dismissal. He can dismiss them at his own will without giving any reason.

Mr. CRANE.—That's all.

Recross-examination.

(By Mr. CLARK.)

Q. So, Mr. Neil, when an employee is appointed by Mr. Deal he reports him, or by any postmaster, he reports him to the Postmaster-General?

A. Yes, Postmaster-General.

Q. And upon his taking the oath of office he becomes an employee of the postal department, does he not? A. He does.

Q. Yes. He is as much an employee of the postal department as the postmaster, who receives a direct appointment, is he not? A. He is.

Mr. CRANE.—Objected to as immaterial.

Mr. CLARK.—That's all.

(Witness excused.)

(Recess.) [295—266]

Mr. CRANE.—Plaintiff rests.

(Whereupon plaintiff rests its case in chief.)

Mr. CLARK.—I have a motion I desire to make, if the Court please, and it isn't ordinarily made in the presence of the jury.

The COURT.—I will excuse the jury until 11:00 o'clock.

(Jury withdrawn.)

Mr. CLARK.—If the Court please, at this time we move for a nonsuit and the dismissal of this action upon the following grounds:

First, that the plaintiff's complaint fails to set forth a cause of action against the defendants, or either of them; particularly upon the ground that there is no express allegation of negligence set forth in the complaint, the plaintiff having failed, refused and neglected to set forth the specific acts of negligence relied upon by them as forming the basis of their action in this complaint.

Second, that there has been no evidence properly introduced in this cause that has tended to show any loss of the registered package in the Fairbanks postoffice or while it was in the possession of the Fairbanks postmaster; and no competent evidence has been introduced to support the allegations of plaintiff's complaint relative to loss suffered by the plaintiff by reason of any of the matters or things set forth in plaintiff's complaint, it having been proved that a loss has been suffered, but there has been no competent testimony to show that loss was suffered by reason of any negligence on the part of [296—267] the defendant T. H. Deal, or by reason of any of the violations of any regu-

lations as set forth in plaintiff's complaint, and in referring to the complaint I refer to plaintiff's second amended complaint.

(Argument.)

The COURT.—I suggested when this case was argued before, at the time you refer to here in your statement now, that it was apparent to me that counsel for the defendants didn't interpret this complaint in the proper manner, and it is apparent you still refuse to regard it in the proper manner.

I called your attention at that time to the fact this was a suit to forfeit the official bond of the postmaster and to enforce the penalty of that bond in view of its terms and in view of the oath of office of the postmaster, and that the complaint alleged that the loss claimed to have been suffered by the plaintiff was due to the negligence and disregard of the regulations by the postmaster in violation of the obligation of his bond, and in violation of the terms and conditions of his oath of office.

Of course, the only negligence that is alleged and that it is necessary for the Government to prove is that the postmaster neglected his official duty and disregarded the regulations and the laws of the postoffice Department.

The Government has met that requirement here by the testimony now produced, and has introduced testimony to show that with reference to the par-

ticular package in controversy the postmaster—tending to [297—268] show, I should say—the postmaster violated numerous laws and regulations of the Postoffice Department with reference to that particular package, and the evidence is sufficient now to carry the case to the jury so far as the plaintiff is concerned on that point. But if it was insufficient on that point, then on the allegations of the complaint the Government would be entitled, upon the showing now made, to recover upon the bond on the strength of the testimony introduced, which tends to show that this package, when it was delivered into the postoffice and into the care and custody of the postmaster, contained government money, which was public funds belonging to the plaintiff in this case, and that even though he observed all the rules and regulations of the Postoffice Department and violated none of them, he would still be responsible to the Government for the loss of that money.

Now, I am going to instruct the jury on those subjects in almost the identical language that I have quoted here, and counsel shouldn't be under any misunderstanding as to how the Court interprets the law on this subject.

The motion will be denied.

Mr. ROTH.—We note an exception.

The COURT.—Exception allowed.

(Recess.)

(Jury recalled.) [298—269]

TESTIMONY OF MRS. L. WILLIAMS, FOR DEFENDANTS.

Mrs. L. WILLIAMS, called as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination.

(By Mr. CLARK.)

Q. Mrs. Williams, would you make up that package just as nearly as you can in the condition that it was when it came into your office, the registered package that came into your office on the 16th of September, 1921? Would you be able to make it up substantially in the position it was?

A. Well, after seeing Mr. Tunison trying to put that nail in I don't know that I would be able to put that nail in.

Q. Well, try and put it in the container here, and put it in just as near the condition as when it came into your office.

Mr. CRANE.—That is objected to as immaterial, also as repetition; that the witness has testified on her other examination as to the condition of it. We object at this time to any demonstration being made.

The COURT.—Well, she may make an effort.

A. Well, when it came in, of course, when it was handed to me in the jacket before I opened it, I never took any particular notice of it. Mr. Tunison just walked over and said, "Here is your

(Testimony of Mrs. L. Williams.)

registers," as he always did, and I never noticed it, and I couldn't see it looked any different than any other package at all.

Q. All I want you to do is to put it in the jacket and have it about as near in the condition it was. [299—270]

A. As I say, I couldn't swear how this was in this register. I know it was in there and that I untied—that the package was in here and was tied with cord, I could swear to that, and I untied it and took it out, but how that was put in here I don't know. I know it was lengthwise, but that is all I could say.

Q. That is all that is necessary. Will you put—

The COURT.—(Interrupting.) I think from the witness' statement she may be excused from demonstrating it. She says she doesn't know how it was, it was just handed to her as any other package and she paid no attention as to the manner in which it was in the jacket.

The WITNESS.—No, I didn't pay any attention to it at all, Judge.

Q. Was it in the package lengthwise?

A. Certainly was. It couldn't go in the other way. You could see yourself it couldn't fit in that any way that way (indicating); it certainly has to be in that way.

Q. Then it was in the jacket lengthwise?

A. Lengthwise.

(Testimony of Mrs. L. Williams.)

Q. No question about that?

A. No question about that.

Q. And you don't think you could put it in substantially the same condition it was?

A. No, I couldn't swear to that. I couldn't tell now whether this was under or it was over. All I know is I was sitting at my desk like this (illustrating), and I don't know whether this package was pasted down, or I didn't pay any attention to it. It was a [300—271] registered jacket, that was all. I reached over and untied it and took it out, but how it was in there I couldn't swear to it.

Mr. CLARK.—That's all, Mrs. Williams.

(Witness excused.)

TESTIMONY OF B. TUNISON, FOR DEFENDANTS.

B. TUNISON, called as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination.

(By Mr. CLARK.)

Q. Mr. Tunison, can you take those various exhibits, consisting of the magazine, the wrapping paper, the canvas sack, the sack of coin and the registry jacket, can you fix those up and show substantially the condition of that package when it came into the office at Nenana when you took it and laid it on Mrs. Williams' desk?

Mr. CRANE.—If the Court please, that is ob-

jected to as repetition, that this witness demonstrated this at one time here.

Mr. CLARK.—No, he merely put the magazine in the canvas sack.

Mr. CRANE.—I believe he wrapped it up and put it in the canvas sack. And furthermore, this witness is not qualified as he didn't testify taking it out of the registry sack. [301—272]

The COURT.—I think the objection ought to be sustained. The only thing the witness can do now is to put the canvas sack and its contents into the registered jacket. He has already demonstrated how it was as far as he could tell without putting it into the registered envelope or jacket, and the jury can very readily understand the character of the package by the demonstration that has already been made.

Mr. CLARK.—Well, what I was asking him to do was to put it in the condition he had it yesterday, then put it in the registered jacket to show as near as possible, the condition when it came into the office.

Mr. CRANE.—May I ask one question preliminarily?

The COURT.—No, not now, Mr. Crane. You can do so some other time if you care to.

Mr. CLARK.—Well, will the Court permit that to be done?

The COURT.—I think I sustained the objection, Mr. Clark, in my previous ruling.

(Testimony of T. H. Deal.)

Mr. CLARK.—To which we note an exception.

The COURT.—An exception will be allowed.

Mr. CLARK.—That is all, Mr. Tunison.

(Witness excused.) [302—273]

TESTIMONY OF T. H. DEAL, FOR DEFENDANTS.

T. H. DEAL, one of the defendants, called as a witness on his own behalf and on behalf of the defendant Bonding Company, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ROTH.)

Q. What is your name? A. T. H. Deal.

Q. You are one of the defendants in this action, are you? A. Yes, sir.

Q. In 1921, September 15th and 16th, what official position, if any, did you hold?

A. Postmaster at Fairbanks.

Q. When had you become postmaster?

A. 1914.

Q. Where was the postoffice located when you took that office?

A. Where the N. C. Hardware is now.

Q. Were you postmaster at the time that the postoffice was changed to its present site?

A. Yes.

Q. When was that? A. I don't recollect now.

Q. How is that?

A. I don't recollect what year it was.

(Testimony of T. H. Deal.)

Q. Well, how soon after you became postmaster?

A. About a year, I suppose, something like that.

Q. About a year or something like that. When you entered the present building as postmaster what, as far as safes are concerned, what was furnished with the building at the time? [303—274] A. The big safe.

Mr. CRANE.—Object as immaterial, if the Court please, what kind of safes were in there.

The COURT.—Overruled.

Mr. CRANE.—Exception.

The COURT.—Exception allowed.

Q. How many? A. One.

Q. Was that the same big safe that was in there when you went out of office? A. Yes.

Q. Do you know whether or not that same safe is still in that office? A. I think it is.

Q. I will ask you to state whether or not in the course of your duties as postmaster it developed as to whether or not that single safe that you had there had sufficient capacity to take care of the Government property that was in your possession?

Mr. CRANE.—Objected to, if the Court please, as incompetent, irrelevant and immaterial, and leading and suggestive.

The COURT.—It is leading, but the objection will be overruled. Save time probably to get the answer.

Mr. CRANE.—Note an exception.

The COURT.—Exception allowed.

A. What was the question?

(Testimony of T. H. Deal.)

Q. Read the question. (Question read.)

A. It did not.

Q. What, if anything, did you do with reference to a [304—275] receptacle to hold registered mail matter?

Mr. CRANE.—That is objected to as not specified as to the time, as incompetent and irrelevant.

The COURT.—Overruled. Let him answer.

A. I went to Volney Richmond and asked him to get something to put some registered mail in, and I said, "We are liable for fifty dollars for all this mail if we lose it."

Mr. CRANE.—I ask the last part of that answer be stricken as not responsive.

Mr. ROTH.—All right, we will consent to that.

The COURT.—Very well.

Q. Just don't say anything about conversations; just state what was done.

A. I said, "I want to—"

Q. (Interrupting.) Just state what was done.

A. He got me a big iron box about this long and about that wide (indicating) and maybe that deep, a fur box with a padlock on top. He says, "I will give you that, but I must have it back when I want it."

Mr. CRANE.—I object to the witness telling any conversation and ask it be stricken.

The COURT.—Yes. You need not state what you said to him or what he said to you. Just state about getting it.

(Testimony of T. H. Deal.)

A. I got the box and put it in the office and used it.

Q. Used it for what? A. Used it for registry.

Q. How long did you use that for registered packages?

A. Well, I can't tell just the time, but I could tell what I done when he took it away from me. [305—276]

Q. Well, what became of it then?

A. He took it back.

Q. Who?

A. Mr. Richmond. He said, "I have got to take it back."

Q. Never mind that. Now what did you do, if anything, as a substitute for that box?

A. I told him I must have another—something to put this registry in, and he says, "All right, I will give you a safe."

Q. Well, just go on. Did he give it to you?

A. Yes, give it to me.

Q. Well, did you have any difficulty in getting it?

A. I asked him a time or two and he hadn't sent it over, and Mr. Wetzler was there—that's all right, is it?

Q. Yes, go on.

A. Mr. Wetzler was there and I says, "Wetzler, go over and get that safe, I want it over here because the mail is out here," and he went over and said they said they was going to send it over. Sent

(Testimony of T. H. Deal.)

it over, and I give a personal receipt for that. They say they hold me responsible for that now.

Q. Did the Government furnish you that safe?

A. No, they didn't.

Mr. HURLEY.—We object to that as being incompetent, irrelevant and immaterial. It doesn't make any difference how the safe was furnished.

The COURT.—Objection sustained.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

Q. I will ask you to state whether or not Mr. Wetzler ordered or directed or instructed you to put registered [306—277] mail in that safe, or in any other safe? A. No.

Mr. HURLEY.—Same objection, if the Court please, as incompetent and immaterial.

The COURT.—Overruled.

Q. What is your answer? A. He did not.

Q. I will ask you to state whether or not Mr. Wetzler ordered or instructed you to lock the safe that had registered matter in it? A. No.

Mr. HURLEY.—Same objection, if the Court please, as being incompetent and immaterial.

The COURT.—Objection sustained.

Mr. ROTH.—If the Court please, I wish to call the Court's attention that as a part of the plaintiff's case that Mr. Wetzler testified, in response to a question propounded by counsel for the plaintiff, that he directed Mr. Deal to lock that safe. Now, I am simply meeting that as a defense. It seems to me that is a defense, an answer to the proof that

(Testimony of T. H. Deal.)

was brought out by plaintiff's own case. I merely want to call the Court's attention to it.

The COURT.—It is for the purpose of contradicting the testimony of the witness Wetzler.

Mr. ROTH.—It is not for the purpose of impeaching the witness, it is for the purpose of answering the proofs tendered by plaintiff.

The COURT.—Well, it wouldn't make any difference, as I view it, whether Mr. Wetzler told him to [307—278] lock the safe or not as long as the postal regulations required him to keep it locked at night.

Mr. ROTH.—Then the Court sustained the objection?

The COURT.—Yes.

Mr. ROTH.—We desire an exception, if the Court please.

The COURT.—Exception allowed.

Q. Mr. Deal, on the night of September 15, 1921, I will ask you to state whether or not that small iron safe was locked, if you know?

A. On what date?

Q. On the evening or night of the 15th of September, 1921? A. It was on the day lock.

Q. Well, I am asking you—

A. (Interrupting.) Well, it was locked, yes, sure.

Q. It was locked with the day combination?

A. Yes.

Q. On the evening of September 15, 1921, I will ask you to state whether or not you saw the regis-

(Testimony of T. H. Deal.)

tered package, the outer wrapping of which is received in evidence here and marked Plaintiff's Exhibit "A" (exhibiting sack to witness)?

A. I think that's the sack that was—the package.

Q. What was the appearance or shape of that sack at that time, Mr. Deal?

A. That sack at that time—it was a square package—well,—

Q. (Interrupting.) What was it shaped like?

A. It was shaped something like you might call a two-pound brick of butter, but bigger, larger. [308—279]

Q. That was the general shape of it?

A. Yes.

Q. Did you notice how full it made the sack at the time? A. It was very full.

Q. I hand you Plaintiff's Exhibit "A"—

Mr. CRANE.—(Interrupting.) I don't believe you have the coin sack in there, Mr. Roth.

Mr. ROTH.—Oh, yes, I have.

Q. (Continuing.) —containing the magazine that is introduced in evidence here—I have forgotten the marking of that—

The CLERK.—"G."

Q. (Continuing.) —Plaintiff's Exhibit "G," together with the coin sack marked Plaintiff's Exhibit "J," and I will ask you to state whether or not the magazine together with the coin sack, if that made a package that was similar to or looked like, or nearly looked like, the package that was received in the office on the evening of September 15, 1921?

(Testimony of T. H. Deal.)

Mr. CRANE.—Just a minute, Mr. Deal. Object to it, if the Court please, as incompetent, irrelevant and immaterial; the witness is not shown he is qualified to testify; no proper foundation has been laid.

The COURT.—Overruled.

Mr. CRANE.—Exception.

The COURT.—Exception allowed.

A. It don't look anything like the package.

Q. How is that?

A. It don't look like it at all. Too long, in the first place. [309—280]

Q. And how about the thickness?

A. The thickness? Too little. Not thick enough. Too long and not thick enough. And it don't fill the sack.

Q. Now, Mr. Deal, I will ask you, if you can, to place this any way that you can place it inside of Plaintiff's Exhibit "C" (handing paper jacket to witness). Be careful not to tear—

Mr. CRANE.—(Interrupting.) Objected to, if the Court please, as not shown that he put it in the original jacket.

The COURT.—Overruled.

A. Now you can't get it in there without tearing it.

The COURT.—Put it down in that far corner.

Q. Don't tear this (indicating). Be careful about this paper. I don't want you to tear this paper. (Witness attempts to place package inside of paper jacket.) Let me have it a minute.

(Testimony of T. H. Deal.)

(Counsel attempts to place package inside of paper jacket.)

Mr. CRANE.—If the Court please, a further objection is that it is incompetent, irrelevant and immaterial, and also that the sack is not closed and shown to be in the same condition as it was at the time it was placed in the jacket; and further, counsel is assuming a state of facts that does not exist.

The COURT.—The jury can see that.

Mr. ROTH.—We tried to put it in the same condition as near as we could and the Court sustained the objection to that, so we are trying to do the best we can. Well, never mind; I withdraw that at the present time. I would like to have that [310—281] exhibit which is the nail.

The CLERK.—That is Exhibit "H."

Mr. ROTH.—Well, just let that stand for the time being.

Q. Mr. Deal, just state what the facts are with reference to that registered package, that package that came in there that was registered on the afternoon or on the day of September 15th, that was sent out in the morning of the 16th of September, 1921. Tell all you know about it, all the facts.

A. It was brought to the window and registered.

Q. Who brought it there, if you know? Did you know?

A. Well, I don't know as I knew who brought it.

Q. Well, never mind, then.

A. I know it was brought there and registered by Miss Houck and put on the table—it is a table

(Testimony of T. H. Deal.)

that you work on at the window, a bench, or what you call it, put to the left there, and then taken by Miss Smith and wrote a—and checked out by Miss Houck, made a bill out for it.

Q. All right.

A. Then she put it into a container, not a jacket.

Q. Is that the container (showing)?

A. That is the container, yes. And Miss Houck checked it off then, put it in there and tied it around with four or five twine, four or five pieces of twine, and then she put it in the safe.

Q. All right.

A. And put it in the safe, and next morning she opened the safe and said, "Here is Nenana register," and I said "All right," and put it in. [311—282]

Q. Did you notice it at that time?

A. Yes, I noticed it at that time, but not particular. Noticed it when Mrs. Arvin come to the window and she says, "Is it too late to get mail to Nenana?" and I says, "No, never too late."

Mr. CRANE.—I object to that, if the Court please.

Q. Never mind what she said.

A. Well, I got the letter, opened the sack, turned this over, and that was put on top, and tried to find the little bunch of letters that went out that morning to stick it in it, but Miss Smith says, "I will just throw it in, I can't find that, and I will let them hunt for it." And I looked at this sack then and it showed the square there on it, showing

(Testimony of T. H. Deal.)

that it was in there; I mean the package was into the—

Q. Yes.

A. And that was put in there the evening before. And the rules that I worked that under, I would like for you to see that book there.

Mr. CRANE.—I object to that as immaterial and move it be stricken.

The COURT.—Objection sustained.

Q. I want to know under what rule you worked there (handing a book to witness)?

A. (Reading.) "Registered matter that cannot be tied—"

Mr. CRANE.—(Interrupting.) What section is that?

A. 896, section 4. "Registered matter that cannot be tied with the ordinary mail should be inclosed, if possible, in unaddressed, unnumbered, and unsealed registered jacket envelopes, used merely as containers for small registered parcels"—these people say— [312—283]

Q. (Interrupting.) Never mind.

A. (Continuing reading.)—"that might become mislaid; otherwise the registered articles should be placed loose in the pouch."

Q. Did you receive any notice, or did anyone in the postoffice to your knowledge, receive notice from anyone as to what that registered package contained? A. No.

Q. Did you know what it contained? A. No.

(Testimony of T. H. Deal.)

Q. I will ask you to state whether or not, Mr. Deal, with reference to the handling of that package, that registered package, so far as you know, if you were in any way negligent in handling the same?

Mr. CRANE.—Objected to, if the Court please, as incompetent, irrelevant and immaterial, and calling for a conclusion, a self-serving declaration.

The COURT.—Objection sustained.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

Q. So far as you know, Mr. Deal, did anyone in your postoffice who had anything to do with this package do any act with reference to the package which was not in strict accordance with the regulations of the Postoffice Department, so far as you know?

Mr. CRANE.—Same objection, if the Court please.

The COURT.—Same ruling.

Mr. ROTH.—Except.

The COURT.—Exception allowed.

Q. What was done with that mail, I mean what was finally [313—284] done with this registered package, Mr. Deal?

A. It was left in the sack, and then—

Q. (Interrupting.) Just a minute now. We haven't got it in the sack yet. What was done with it when Miss Smith took it out of the safe?

A. She put it in.

Q. In what?

(Testimony of T. H. Deal.)

A. She says, "A register for Nenana." I says, "O. K., all right, O. K.," and she put it in the sack.

Q. In what sack? A. In the pouch.

Q. In the regular mail-pouch? A. Yes.

Q. All right.

A. And, as I told you, I put a letter in and hunted for the little bunch of letters—

Q. Yes.

A. (Continuing.) —and turned this over, that I was hunting for it, and see this square package through this envelope, and then Miss Smith—I locked it up then—Miss Smith had locked it up and I unlocked it—

Q. (Interrupting.) You what?

A. Miss Smith had locked it up first, then when this letter came, why, I unlocked it and put this letter in, and then Mr. Wetzler come in—

Q. (Interrupting.) Just hold on before you go any further. After Miss Smith had put this registered package into a mail-pouch and locked it up you unlocked the pouch? A. Yes.

Q. And looked through the pouch?

A. Yes. [314—285]

Q. What did you look for?

A. Looked for a little bundle of letters that was tied up for Nenana to put this letter in.

Mr. CRANE.—Objected to as immaterial, if the Court please.

The COURT.—Overruled.

Q. Did you see this package? A. Yes, I did.

(Testimony of T. H. Deal.)

Mr. CRANE.—Objected to as repetition, if the Court please. That is the fourth time he testified to that.

The COURT.—Yes, I think it has been covered several times.

Q. I will ask you to state when you saw that package in there, this registered package in there, state whether it had the same appearance that the package had the night before when you saw it, when you saw Miss Smith put it in the safe, or before she put it in the safe? A. Yes.

Mr. CRANE.—Objected to, if the Court please, as repetition.

The COURT.—He may answer the question. Overruled.

Q. I will ask you to state whether or not that registered package as you saw it in the postoffice, I mean in that mail-sack or mail-pouch, was anything like in shape of a magazine folded up such as I have shown you here? A. No.

Mr. CRANE.—Objected to, if the Court please, as incompetent, irrelevant and immaterial, and calling for a conclusion and opinion of the witness. [315—286]

The COURT.—Overruled.

Mr. CRANE.—Exception.

The COURT.—Exception allowed.

Q. Answer the question, Mr. Deal.

A. It had no appearance of this at all.

Q. Mr. Deal, I will ask you to state whether or

(Testimony of T. H. Deal.)

not the package contained in that register that you saw put in the safe the evening of the 15th of September, 1921, left that postoffice?

A. It left the postoffice on the morning of the 16th.

Q. What did you do with the mail-pouch that contained this particular registered mail package?

A. Mr. Wetzler come in—

Q. (Interrupting.) What did you do with it, I am asking you that? What did you do with it?

A. I locked it up.

Q. Then what did you do with it?

A. Then set it down again.

Q. But what did you finally do with it, Mr. Deal? A. I sent it out to Nenana.

Q. Well, to whom did you deliver it?

A. I delivered it to Mr. Lillico and Mr. Fairborn. Lillico was the proper one to have it.

Q. Now was Mr. Wetzler in the postoffice at the time that was delivered? A. Yes.

Mr. CRANE.—Objected to as immaterial, if the Court please.

The COURT.—Overruled.

Q. How many sacks of mail went out at that time, Mr. Deal?

A. There was a Tanana pouch—that means a lock. [316—287]

Q. That's one.

A. Tanana—or Yukon, below Tanana.

Q. That's two. A. Hot Springs lock.

(Testimony of T. H. Deal.)

Q. That's three. A. Nenana lock.

Q. Four.

A. And one sack of parcels, I mean of mail, of second class, and a pouch, a little pouch about that long (indicating) tied to the top of this one with two bunches of magazines in it.

Q. What magazines were they?

A. They belonged to the library.

Q. St. Matthew's Mission? A. Yes.

Q. Where did they go?

A. They went to a point—to wood camps down here. I don't know just which camp now it was, but we tied them on there and they wasn't billed. And we never billed those little stacks that is tied on, then when they got to that point they throw them off. We send them down every few days that way to some point.

Q. Do you know whether or not Mr. Wetzler was aware of the fact that these magazines were sent in that way from time to time from St. Matthew's Mission? A. Oh, yes.

Mr. CRANE.—That is objected to, if the Court please, as incompetent, irrelevant and immaterial and calling for an opinion of the witness.

The COURT.—Overruled. You may answer.

A. Yes. That morning, though, when Mr. Wetzler come in, [317—288] Mr. Fairborn and Eli Seko come in, one of them picked up the sack, I don't know which one it was, and says, "This is a

(Testimony of T. H. Deal.)

treasury sack," and I says, "Yes, you are a wise ginney."

Q. Which sack did he pick up?

A. A box of springs about that big around (indicating) that had been lost in the mail somewhere, belonged to the N. C. Company, and we were sending them to Ruby. Mr. Wetzler then—

Q. (Interrupting.) Just state what occurred in there when Mr. Wetzler was in there with Mr. Fairborn and Mr. Seko.

A. Mr. Wetzler says, "Is everything closed?" I says, "Yes, but I will unlock it." I was standing right close to the sack, and I just picked it up there, Mrs. Arvine's letter, and I went that way and picked up the keys, and he says, "No, I will send it by the purser here, he is responsible." I says, "All right."

Q. Well, did he give—

A. (Interrupting.) He give the letter then to Mr. Fairborn.

Q. How did you come to deliver that mail to Mr. Larry Lillico?

A. Well, Mr. Fairborn was there with him.

Mr. CRANE.—If the Court please, I ask that the witness confine his answers directly to the question asked him.

A. (Continuing.) Lillico and Fairborn.

Q. How did you come to deliver it to Mr. Lillico?

A. Well, Mr. Fairborn had him here to—

Q. (Interrupting.) No, no, one moment, Mr.

(Testimony of T. H. Deal.)

Deal. Was Mr. Lillico the proper person to hand it to, and if so, why? [318—289]

A. He was for that—

Q. (Interrupting.) Who appointed him to that position? A. The Government.

Q. Then he was a Government carrier of the mail? A. Oh, yes.

Q. From where and to where?

A. From the postoffice to the depot.

Q. All right. State whether or not, if you know, this package, this registered package was delivered by you to Mr. Larry Lillico in the same condition that it was received by you in the afternoon or evening of the 15th of September, 1921?

Mr. CRANE.—That is objected to as incompetent, irrelevant and immaterial, a proper foundation not having been laid, and calling for a conclusion and opinion of the witness.

The COURT.—Objection sustained.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

Q. Mr. Deal, you are acquainted with Mr. E. A. Hering, Ed Hering? A. Yes.

Q. Was he employed in the postoffice under you at any time? A. Yes.

Q. When did he cease his regular employment in there, if you know? Well, never mind about that. He has already testified about that. But after he ceased as a regular employee in there I will ask you to state whether or not he was an

(Testimony of T. H. Deal.)

authorized person by you to come in there and assist in handling the mail? [319—290]

A. He did.

Mr. CRANE.—Objected to, if the Court please, as incompetent, irrelevant and immaterial, and be self-serving on the part of the defendant; and besides, it is covered by the postal laws and regulations, and it hasn't been shown here that any authority existed for the postmaster to authorize any person to be in there.

The COURT.—Objection sustained.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

Q. You are acquainted with Mr. Wetzler?

A. Yes.

Q. You may state whether or not Mr. Wetzler had been in your office at different times prior to the 15th day of September, 1921? A. Yes.

Q. Many times? A. Many times.

Q. Prior to that time I will ask you to state whether or not Mr. Wetzler was familiar with your method of making up registered mail? A. Yes.

Mr. CRANE.—Objected to, if the Court please, as incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

Q. Did Mr. Wetzler at any time complain to you about your method of making up your registered mail?

(Testimony of T. H. Deal.)

Mr. CRANE.—Just a minute. Same objection, if the [320—291] Court please.

The COURT.—Same ruling.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

Q. Were you in any way responsible for that mail, Mr. Deal, after it left the postoffice and got to the railroad? A. No.

Mr. ROTH.—You may cross-examine.

Cross-examination.

(By Mr. CRANE.)

Q. Mr. Deal, was the postage paid upon this registered parcel addressed to Mr. Doner?

A. Yes, paid.

Q. By whom? A. The bank.

Q. How much? A. Twelve cents.

Q. Are you sure about that?

A. Yes, sir, because the United States can't—

Q. (Interrupting.) I am asking you, are you sure about that?

A. Well, it should have been in there, and I think—

Q. (Interrupting.) I am asking you to answer my question, Mr. Deal, and we will get along better. Are you sure about that?

A. This is registered.

Q. Isn't it a fact only the ten-cent registry fee was paid?

A. Well, that is what I say, the registry was paid on that.

(Testimony of T. H. Deal.)

Q. And it is a fact there was no other postage paid on that, was there? [321—292]

A. I don't think there was.

Q. You think there was postage or wasn't?

A. No, sir.

Q. You think there was postage or wasn't?

A. I don't think so.

Q. I will ask you to look at it, Mr. Deal, and see if there is any postage on there besides the ten cents? A. Well, I say there wasn't.

Q. Why.

Mr. ROTH.—We object to that on the ground it is incompetent, irrelevant and immaterial.

The COURT.—Overruled.

Mr. CLARK.—We except.

The COURT.—Exception allowed.

Q. Go ahead and answer the question.

A. It was franked through.

Q. Why was it franked through?

Mr. ROTH.—We object to that on the ground the same is irrelevant, incompetent and immaterial. The postmaster is not supposed to know why an article is franked.

The COURT.—Overruled.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

A. I said it was franked through by the Government.

Q. I asked you why it was franked through by the Government? A. By the Government.

(Testimony of T. H. Deal.)

Q. Why?

A. Well, because they got orders to that effect somewhere.

Q. That isn't the reason why, Mr. Deal. Go ahead and tell [322—293] me why.

A. Well, what is it? I don't know.

Q. You don't know why?

A. No, only I say the Government—it was just franked through, and that goes without stamps.

Q. As postmaster, Mr. Deal, did you ever read up in the corner of the general penalty envelope "$300.00 fine if this is used for anything besides official business," or something to that effect?

A. Oh, yes; sure.

Q. Isn't it a fact, then, that the reason that the postage wasn't paid on this was because it was Government property?

Mr. ROTH.—That is objected to on the ground the same is irrelevant, incompetent and immaterial. That doesn't follow by any means, if the Court please. The District Attorney's office is franking letters out all the time.

Mr. CRANE.—They are all on official business, too.

The WITNESS.—It isn't Government property.

The COURT.—Objection overruled.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

Q. What is your answer, Mr. Deal?

A. You mean as to Government property? Not necessarily as I could read it.

(Testimony of T. H. Deal.)

Q. Well, what is it, then?

A. Well, it is franked through by a Government official, or like the railroad would be. They go get a frank through. Not necessarily all Government as to that.

Q. The bank isn't a public official, is it? [323—294] A. They could be appointed.

Q. Well, were they in this instance?

A. I don't know.

Q. Now, isn't it a fact, Mr. Deal, that the reason this was franked through was that the bank was provided with frank labels in order to send Government property to the Alaska Railroad?

Mr. ROTH.—We object to that on the ground the same is irrelevant, incompetent and immaterial, no proper foundation laid for the introduction of the testimony, and this witness is not supposed—in cross-examination the witness is not supposed to know that.

The COURT.—Objection overruled.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

A. Well, they would get it from the Government to frank these things through.

Q. What do you mean by "these things"?

A. I mean anything they would wish to send.

Q. And anything they would wish to send would be Government property, would it not?

Mr. ROTH.—We object to that on the ground the same is irrelevant, incompetent and immaterial.

(Testimony of T. H. Deal.)

It is not true necessarily that anything that they would wish to send would be Government property.

The COURT.—The witness can answer.

Mr. ROTH.—We except to the ruling of the Court.

The COURT.—Exception allowed.

A. I don't know that. [324—295]

Q. You know that anything to be franked must be official business or Government property, don't you?

Mr. ROTH.—We object to that on the ground the same is irrelevant, incompetent and immaterial. It is supposed to be; might not be. People are being prosecuted and convicted for using that frank without authority, so everything that is franked is not properly franked.

The COURT.—The witness may answer.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

A. It would be through the Government if they would get that privilege anyhow.

Q. You didn't answer my question yet.

A. What was the question?

Q. Read the question. (Question read.)

A. Well, I know it generally is, but I don't know as to that—

Q. (Interrupting.) You know that it generally is? A. Yes.

Q. You were postmaster? A. Yes.

Q. Familiar with the postal regulations?

(Testimony of T. H. Deal.)

A. Yes.

Q. Were you?

A. Yes. To some extent. That book is about twenty hundred sections in it. I don't think I can pick up that book, and I don't think a man in the house but what I could stall him so far as I know.

Q. Never mind. You have answered.

A. Well, you asked me if I knew. Nobody knows that book. [325—296]

Q. Mr. Lillico was the authorized person to deliver that mail to that morning, was he not?

A. Yes.

Q. That is, the mail for Nenana? A. Yes.

Q. You didn't deliver it to anybody else, did you? A. No.

Q. You would have no authority to deliver it to anybody else, would you? A. No.

Q. Mr. Deal, you heard the testimony of Evalyn Houck, your niece,—I believe she is your niece, isn't she? A. Yes, sir.

Q. You heard her testify she thought this contained currency, did you not?

A. I didn't hear that.

Q. You didn't hear that. You were sitting here in the courtroom at that time? A. Yes.

Q. You hard of hearing, Mr. Deal?

A. No, sir.

Q. But you didn't hear that?

A. No. I heard her say there was somebody in the lobby said that.

(Testimony of T. H. Deal.)

Q. That isn't what you heard.

Mr. ROTH.—That is what she said.

The COURT.—There is no use arguing with the witness, Mr. Crane.

Q. Mr. Deal, did you examine this parcel yourself or did you just see Miss Smith handle it?

A. I saw it up on the board at the window. [326—297]

Q. And you didn't handle the parcel yourself?

A. Only in the bag.

Q. Only in the bag. Did you open the registered jacket and see if the contents were intact before dispatching it? A. This container was—

Q. (Interrupting.) Answer my question now, Mr. Deal, please.

A. I looked at this container in the bag and felt it as I turned it over and looked at it.

Q. Now will you answer my question? Read the question.

(Question read.)

A. No. The rules don't say to do it.

Q. That is all right, what the rules say. When the package arrived in the postoffice in the evening, or the afternoon, I understand you to say you noticed it on the table, is that correct?

A. Yes. Then I saw Miss Smith putting it in.

Q. You told Miss Smith to put it in the safe, did you not? A. Don't know as I did.

Q. What? A. She done that, I think.

Q. Did you tell her to?

(Testimony of T. H. Deal.)

A. I don't think I told her anything.

Q. You are not sure about that?

A. No. I don't know that.

Q. You wouldn't swear that you did or didn't?

A. No.

Q. And, Mr. Deal, did you, on the night of September 15, 1921, give Ed Hering the keys to the postoffice and work-room?

Mr. CLARK.—One moment, if the Court please. We [327—298] object as not cross-examination.

Mr. CRANE.—I don't know what it is if it isn't cross-examination.

Mr. CLARK.—We didn't go into that matter in any way at all with Mr. Deal on his direct examination.

The COURT.—Objection sustained.

Mr. CRANE.—Exception, please.

The COURT.—Exception allowed.

Q. Mr. Deal, about what size parcel was this in the canvas bag? Was the bag fairly full?

A. The canvas bag was very full.

Q. Is that what you call a small parcel?

A. I wouldn't call it—I didn't treat it as a small parcel either.

Q. You didn't treat it as a small parcel?

A. No.

Q. In fact, small parcels, in that regulation which you read, referred to, means jewelry or small articles that is apt to be lost?

A. No, it don't refer to that at all.

(Testimony of T. H. Deal.)

Q. It doesn't? A. No. If it does it is in a—

The COURT.—If that is a convenient place to stop we will take a recess.

(Recess.)

Whereupon an adjournment was taken until 2:00 o'clock P. M. [328—299]

AFTERNOON SESSION.

Thursday, February 19, 1925, 2:00 P. M.

T. H. DEAL, on the stand.

Cross-examination (Resumed).

(By Mr. CRANE.)

Q. Mr. Deal, I believe you stated on your direct examination that you dispatched some magazines the morning of the 16th. That what you testified to? A. Yes, sir.

Q. I will ask you, Mr. Deal, if during the investigation you informed either Inspector Fitzgerald or Mr. Wetzler that you dispatched those magazines. A. It wasn't taken up.

Q. It what? A. No, I did not.

Q. You did not? A. Not as I know of.

Q. Handing you Plaintiff's Exhibit "C," I call your attention to the writing on there and ask you whether or not that is addressed?

A. Yes, that is addressed.

Q. It is addressed, isn't it? A. Yes.

Q. I will ask you to read the capital letters on the line which I indicate there on the exhibit.

(Testimony of T. H. Deal.)

That will be the fourth line, Mr. Deal. It is the first line in capital letters.

A. "Be sure to seal securely and postmark plainly." [329—300]

Q. Yes, sir. What do the large letters at the top of it say?

A. "United States Postoffice Registered Jacket."

Q. Mr. Deal, shortly after this rifling of this package, to be more certain on the 18th day of September, 1921, the circumstances and facts were very clear in your mind, were they not?

A. They should be, yes.

Q. And you made an affidavit or sworn statement of what you knew about the rifling of this package on that date, did you not?

A. Well, not a sworn statement; I just made a statement.

Q. Not sworn? A. I don't think so.

Q. I will ask you to examine this and ask you if that is your signature (handing paper to witness)? A. That is my signature.

Q. What does this say over here in the corner of it?

A. "Sworn and subscribed before me this date September 18, 1921, at Fairbanks, Alaska.

Q. You may read that affidavit if you wish, but I will call your attention to the center of the front page in particular where you outline what you dispatched on that day and ask you whether or not you say anything about magazines there, and

(Testimony of T. H. Deal.)

if, on the other hand, you don't set up exactly what you dispatched on that day?

A. The weight, six pounds—

The COURT.—He doesn't intend that you read it.

Q. No, I just asked you if you say anything about dispatching any magazines there?

A. No, we don't bill on magazines when we tie them on that [330—301] way. We tie them to a sack.

Q. Do you say anything about tying them to a sack or sending any out on that day?

A. No, I don't know as we did.

Q. Did Mr. Fitzgerald question you several times in particular about magazines and if you sent any magazines out that day, and about nails and if there were any nails around the postoffice?

A. Never questioned me about sending out anything. But nails, why, there is plenty of them there.

Q. Isn't it a fact, Mr. Deal, that both Mr. Fitzgerald and Mr. Wetzler on several occasions during the investigation asked you particularly about magazines in the postoffice and magazines out of the postoffice and if you dispatched any that day?

A. No dispatch.

Q. Or sent any?

A. No, sir, never.

Q. They didn't inquire about magazines?

A. No. But they did—they did in—

(Testimony of T. H. Deal.)

Q. (Interrupting.) Did you—

Mr. ROTH.—Wait till he finishes his answer.

A. (Continuing.) But we hunted over the post-office—

The COURT.—Never mind, now, what you did. He has asked you what they said to you, what they asked you about.

A. They asked me about certain magazines in there, and if certain people, if you want me to mention, could get to those magazines and they was in the habit of reading them. And we looked through the postoffice, but no specific magazine was mentioned. [331—302]

Q. I don't care about that, Mr. Deal, I just want to know if they asked you about magazines?

A. And then we looked through for paper that covered the bills.

Q. Never mind what you looked for, Mr. Deal. Did they ask you about magazines?

A. I beg your pardon?

Q. Did they ask you about magazines?

A. Yes, they asked me about magazines.

Q. Now, Mr. Deal, at that time when Mr. Fitzgerald and Mr. Wetzler were investigating the rifling of this package were you informed that when this package arrived at Nenana it was found to contain a Popular Mechanics magazine?

A. No.

Q. You didn't know that? A. No.

(Testimony of T. H. Deal.)

Q. When did you first learn what the contents of that package was?

A. Right over there the other day.

Q. You never heard before what was in it?

A. No, never told me.

Q. How did you know that they were looking for magazines then?

A. Well, they said there was a magazine in this package.

Q. That is just what I asked you.

A. Well, I said, or whoever said—but I know I didn't get it from there.

Q. Maybe you can understand me better. You did know prior to coming into the courtroom, then, that there was a magazine found in that package? [332—303] A. Yes.

Q. You knew that? A. Yes.

Q. And you knew that at the time of the investigation, did you not?

A. Nobody—yes, I knew it.

Q. You knew it? A. Yes.

Q. Exactly. And you didn't tell Mr. Wetzler or Mr. Fitzgerald that you sent out any magazines on that day?

A. But they was the ones that was talking it.

Q. Answer my question, Mr. Deal.

A. I didn't know it was in there then.

Q. Did you know it was in there or didn't you know it? A. I didn't know it.

Q. You didn't know it? A. No.

(Testimony of T. H. Deal.)

Q. When did you first find out there was a magazine in that parcel?

A. From people around town. I don't know who it was.

Q. During the investigation? A. Afterwards.

Q. Isn't it a fact that Mr. Wetzler told you what was in that package, and so did Mr. Fitzgerald?

A. No.

Q. And showed you what was in there?

A. No, they didn't do that.

Q. They didn't do that? A. No.

Q. And you never told them about any magazines before? A. No. [333—304]

Q. What did you think when they were hunting for magazines?

A. Well, speaking of certain magazines; I was looking for them. They asked about one magazine, Mr. Wetzler, not Mr. Fitzgerald.

Q. Did they tell you why they were looking for magazines? A. No, they didn't tell me that.

Q. They didn't tell you? A. No.

Q. You had no idea what they were looking for magazines for? A. No, I didn't know.

Q. That is your testimony is it? A. Yes, sir.

Mr. CRANE.—All right. That's all, Mr. Deal.

Redirect Examination.

(By Mr. CLARK.)

Q. Were these magazines, these bundles of magazines that you speak of, were those billed out as

(Testimony of T. H. Deal.)

regular mail or were they simply sent for distribution?

A. Just sent down to some place on the railroad here, to some wood camp or station.

Q. Did you know anything about any arrangement being made with the railroad about deadheading magazines of that kind for men along the road?

Mr. CRANE.—Object to that, if the Court please, as calling for a conclusion and opinion of the witness.

The COURT.—Overruled.

A. Well, people usually sent them down there and the railroad would take them along free for them. [334—305]

Q. Do you know how long that system of distributing magazines throughtout the interior, through these bundles, how long that had been in practice?

Mr. CRANE.—Objected to, if the Court please, as immaterial and no foundation laid.

The COURT.—Objection sustained.

Q. In what kind of a receptacle were those magazines, those bundles, when they left the postoffice that morning?

A. They was in a sack jacket of cloth, and it was about that—about eighteen inches or two feet long, just put in there and pulled up with a string and then tied to the top of this other sack.

Q. No records were kept in the postoffice of anything of that kind going out? A. No.

(Testimony of T. H. Deal.)

Q. There is one question that probably should have come on direct examination. I merely want to ask him about the lights of the postoffice. If you insist I will recall him for further direct examination.

Mr. CRANE.—No, I won't object to it on that ground, Mr. Clark. I will object to it as being immaterial, however.

Q. Mr. Deal, in September, 1921, what was the custom as regards the lights in the postoffice at night?

Mr. CRANE.—Objected to as immaterial, if the Court please, incompetent and irrelevant.

The COURT.—Overruled.

A. The lights were turned on heavy to the safe, a very large lamp, and about four—two or three back of the sacks, and one up to the front window, and one on the [335—306] money order window. There is about five lights generally.

Q. Were they kept on all night?

A. Yes. There was a very large one in the safe.

Mr. CLARK.—That's all.

Recross-examination.

(By Mr. CRANE.)

Q. Mr. Deal, in regard to these magazines, who sent them out, who shipped them that morning?

A. Miss Smith and myself.

Q. No, I mean who sent them? Who were they coming from?

(Testimony of T. H. Deal.)

A. I don't know. They were put up by the church down here, the library, and put in—

Q. (Interrupting.) What church?

A. Well, the St. Matthew's library.

Q. Who put them up, do you know?

A. I think generally Mrs. Clark generally puts them up. She does now.

Q. Who were they going to that morning?

A. I can't name who they were going to.

Q. Where did they go to?

A. Well, on the line betwixt here and Nenana.

Q. You don't know where along the line?

A. No, I couldn't tell you.

Q. Nor you don't know who they went to along the line? A. No.

Q. But you do know they went out that morning?

A. Yes.

Q. And when is the first that you thought of them going out that morning, when did you first discover it? [336—307]

A. Well, we knew it that day.

Q. What?

A. We knew it that day when they went out.

Q. Why were you interested in it that day?

A. Why was I interested in it that day?

Q. Yes, how did you come to call it to mind that day?

A. Because we put them up that morning and tied them onto that sack.

(Testimony of T. H. Deal.)

Q. What importance did they have to you that day?

A. The same as the other mail. We always notice what we send out.

Q. Do you remember what you send out every day? A. Not every day.

A. Well, how do you particularly remember sending it out on this particular morning, the magazines?

A. Well, because they phoned from Nenana.

Q. What?

A. The phone from Nenana called attention to what we shipped out. It didn't call attention, but we went and looked for what we shipped out.

Q. What called it to your attention?

A. Well, this is the day that the Nenana people received this register, and we called out—we saw what we shipped out then, you see, naturally would.

Q. I will ask you, Mr. Deal, if it isn't a fact that the first time you mentioned anything about any magazines was some several days after this robbery, you mentioned it to Miss Smith that you might have sent magazines, or asked her if she remembered sending magazines out that morning? Isn't that a fact, now, Mr. Deal? A. No. [337—308]

Q. All right; who was the first person that you told it to then, about these magazines?

A. Me and Miss Smith talked it over.

Q. And that was how many days after the robbery? A. She mentioned it that day, I think.

(Testimony of T. H. Deal.)

Q. And you didn't call it to the attention of the investigating officers? A. Because—

Q. (Interrupting.) Answer my question, Mr. Deal. You didn't call it to their attention, did you?

A. No.

Mr. CRANE.—That's all.

(Witness excused.)

TESTIMONY OF JOHN K. KELLY, FOR DEFENDANTS.

JOHN K. KELLY, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLARK.)

Q. Your name is John K. Kelly? A. Yes, sir.

Q. How long have you resided in Fairbanks, Mr. Kelly?

A. Between nineteen and twenty years.

Q. Are you acquainted with Mr. Deal?

A. Yes, sir.

Q. Did you know Mr. Deal the years 1917 and '18? A. I did.

Q. Were you in the employ of the Northern Commercial [338—309] Company at that time?

A. I was.

Q. Did Mr. Deal ever make application to you for a safe to be put in the postoffice?

Mr. CRANE.—Just a minute, Mr. Kelly. If the

(Testimony of John K. Kelly.)

Court please, I wish to object to that as being incompetent, irrelevant and immaterial. No difference in this action how the safe got into the post-office or by whom it was procured.

The COURT.—Objection overruled.

Q. Did he make application to you for a safe?

A. Yes, he mentioned it to me once or twice.

Q. Did he tell you what he wanted the safe for?

Mr. CRANE.—Same objection, if the Court Please.

The COURT.—Overruled.

Mr. CRANE.—Exception, please.

The COURT.—Exception allowed.

A. He wanted a safe to keep the registered packages in.

Q. Did the Northern Commercial Company afterwards deliver to him a safe? A. Yes.

Q. Did you take a receipt for it? A. I did.

Q. Have you that receipt in your possession?

A. I have.

Q. Will you produce it, Mr. Kelly, please? (Witness produces paper.) Is this the receipt that was given at that time? A. That was the receipt.

Mr. CLARK.—Now, if the Court please, we do not desire to put this in evidence as an exhibit [339—310] as it is part of the permanent records of the Northern Commercial Company, but if it is admissible in evidence we would like to have it read in after being shown to the District Attorney.

(Testimony of John K. Kelly.)

Mr. CRANE.—No objection to it.

Q. Just read the receipt, just the receipt part, into the record, Mr. Kelly.

A. Dated "May 28, 1918." Marked "Steamer Arnold safe." "The above safe marked 'Steamer Arnold safe' is loaned to the postoffice at Fairbanks by the Northern Commercial Company, and is to be returned to the Northern Commercial Company, or delivered upon the order of said company, on demand." Signed "T. H. Deal, P. M. Postmaster at Fairbanks, Alaska, for U. S. Postoffice."

Mr. CLARK.—That's all.

Mr. CRANE.—No cross-examination.

(Witness excused.)

TESTIMONY OF ED. A. HERING, FOR DEFENDANTS.

ED. A. HERING, called as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination.

(By Mr. CLARK.)

Q. Mr. Hering, you had been employed in the postoffice for a great many months before the 15th day of September, 1921, I believe? [340—311]

A. Yes, sir.

Q. Did you know anything about the system of distributing bundles of magazines to people throughout the interior of Alaska that was main-

(Testimony of Ed. A. Hering.)

tained by the reading-room of the St. Matthew's church or mission?

Mr. CRANE.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Overruled.

Mr. CRANE.—Exception.

The COURT.—Exception allowed.

A. I did.

Q. And where were the bundles, from what place were the bundles received, Mr. Hering?

A. Sometimes they were kept right in the postoffice after they came from the outside, and others they were brought up by the Clark boys, John or Warren Clark, for distribution to the different people coming in and out of the office to be sent out.

Q. Do you know who made up the bundles down at St. Matthew's, who had charge of the work?

Mr. CRANE.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Q. When those magazines were sent out for distribution, Mr. Hering, how were they sent? Were they billed out of the postoffice as regular mail?

Mr. CRANE.—Objected to, if the Court please, for the reason—

The COURT.—(Interrupting.) Overruled.

A. I never billed any out, no, sir.

Q. How were they generally sent, in what way? [341—312]

A. They were sent to the employees along the

(Testimony of Ed. A. Hering.)

railroad during the period of construction tied onto the mail sacks, or put into what I called a small bar knot or double knot tie-sack. At other times they were sent by Carl White, or any mail carrier. They carried them *gratis* as an accommodation to the workingmen, or wood camps, or steamboat camps along the river, as they went. I generally gave the purser of the boat several bundles of them.

Q. This was a system of free distribution of reading matter, was it? A. It was.

Q. Do you know anything about whether or not a bundle of that kind or a sack of that kind went out of the postoffice on the morning of the 16th of September, 1921, in company with the other packages?

Mr. CRANE.—This is objected to as incompetent, irrelevant and immaterial; for the further reason the witness hasn't shown himself qualified; and further, it assumes to state a state of facts that do not exist. There is no testimony to show this witness was present there at the time of dispatching the mail.

The COURT.—He was asked if he knows.

Mr. CLARK.—I admit that. He was not present.

The COURT.—You may answer if you know, Mr. Hering.

A. I do not know.

(Testimony of Ed. A. Hering.)

Mr. CLARK.—I had forgotten that he had left the postoffice before that time.

Q. Now, Mr. Hering, for a number of years, or a good many months, the trains for Nenana left Fairbanks in the [342—313] morning, did they not? A. Yes, sir.

Q. Now in making up mail ordinarily to go down to Nenana when was the mail made up, on the morning the train left or the evening before?

A. It depended on the kind of mail, Mr. Clark. There is a difference in working the mail. The first-class mail that comes in during the night is generally made up, started to be made up, about an hour before the departure of trains. Registered mail is all made up the night before ready for dispatch the next morning by the dispatching clerk.

Q. And when it is made up where is it ordinarily put?

Mr. CRANE.—If the Court please, I object to this on the grounds of being incompetent, irrelevant and immaterial; on the further ground that the witness was not employed in the postoffice at that time, and it doesn't tend to prove or disprove any facts regarding this action or the transaction of the 15th or 16th of September.

The COURT.—Objection sustained.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

Q. While you were working in the postoffice, Mr. Hering, were you the dispatching clerk?

(Testimony of Ed. A. Hering.)

A. I was.

Q. Was Mr. Wetzler in the office very often?

A. Part of the time he was stationed here in Fairbanks, was in the office every day. At other times he was away, but he was in quite frequently.

Q. Did he ever object to any of the methods that you were [343—314] pursuing in dispatching mail?

Mr. CRANE.—Objected to, if the Court please, as incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

Q. Do you remember the time when the small safe was brought into the postoffice? A. I do.

Mr. CRANE.—Objected to, if the Court please, as immaterial and a repetition.

The COURT.—Overruled.

Q. Without stating what your conversation was, did you have any conversation with Mr. Deal concerning the necessity for a safe at any time before that safe was brought into the postoffice?

A. Several times.

Q. For what particular purpose was the safe required?

A. For placing the registered mail that came in from the creeks at night, and from Nenana at night, and that going out in the morning. That at night would be placed in until it was distributed; that going out in the morning would be placed in

(Testimony of Ed. A. Hering.)

until it was dispatched. During the interval when we had no safe I had to put it in the ordinary letter rack or in baskets, and I was worried over it—

Mr. CRANE.—I object to the last part of the answer and ask it be stricken as not responsive.

Mr. CLARK.—That is true.

Q. Did you and Mr. Deal confer with regard to the necessity of having some safer place? [344—315]

Mr. CRANE.—Objected to as irrelevant and immaterial and hearsay.

The COURT.—Overruled.

A. We did.

Q. You know of the efforts—this is of your own knowledge—do you know what efforts Mr. Deal made to secure a safe?

Mr. CRANE.—Same objection.

The COURT.—Overruled.

A. I do.

Q. What did he do towards securing a safe?

A. He went to Mr. Coleman and to—I think Mr. Richmond was here at the time. At any rate to Mr. Coleman and asked to have a safe of some kind put in there in place of the box that had been taken away.

Q. That box was an iron box?

A. I thought it was an old Wells-Fargo box. It was an iron box with a padlock affair, to which I carried one key.

(Testimony of Ed. A. Hering.)

Q. Did you ever hear Mr. Deal and Mr. Wetzler discussing that safe, the necessity for a safe?

A. No, I didn't hear the conversation. I heard it spoken of, simply as hearsay.

Mr. CLARK.—That's all.

Cross-examination.

(By Mr. CRANE.)

Q. You had nothing to do with the making up or the dispatching of the mail on the 15th or 16th of September, did you?

A. No, I wasn't around there at that time at all. [345—316]

Q. You were not employed at the postoffice at that time? A. I was not dispatching clerk then.

Q. You were not employed by the postal department at that time?

A. I was still working there as extra.

Q. Mr. Hering, you were not employed at the postoffice at that time and drawing pay from the Government, were you?

A. Without compensation; no compensation; no, sir.

Q. Now just a minute. You were paid off the 15th of August, when you quit there, were you not?

A. I presume that was the day; if not, shortly afterwards.

Q. Well, whatever day it was?

A. My pay ceased on the 15th day of August, yes, sir.

Q. And your employment ceased at the same time, did it not?

(Testimony of Ed. A. Hering.)

A. Well, I was still working there, Mr. Crane, but probably not officially. I was working at Mr. Deal's request. No, I don't know whether he had the authority to hire me or not. I considered I was working there as an extra.

Q. When you went out Miss Smith took your place, did she not?

A. As dispatching clerk, yes, sir.

Mr. CRANE.—That's all.

Redirect Examination.

(By Mr. CLARK.)

Q. Did Mr. Deal request you to assist Miss Smith? A. He did.

Q. And you did, you continued to assist her?

A. I did. I was still helping her. [346—317]

Q. Helped to assist in dispatching the mail?

A. Yes.

Mr. CLARK.—That's all.

Recross-examination.

(By Mr. CRANE.)

Q. Mr. Hering, isn't it a fact you were only there twice during that month assisting Miss Smith?

A. Oh, no.

Q. How many times?

A. I was there practically every first-class mail, and I was there several times on helping with the dispatch and making out the bills. I didn't keep any track of it because it was such a trifling thing I didn't consider it at the time. I considered I was simply doing my duty.

(Testimony of Ed. A. Hering.)

Q. Now you worked during that month in the laundry, did you? A. Yes, sir.

Q. You worked what hours there?

A. From 7:00 in the morning until half-past 4:00 or 5:00 or 6:00 o'clock. My work was such that when I was through I left the laundry.

Q. And then whatever assistance you gave in the postoffice was after that hour, was it?

A. Yes.

Mr. CRANE.—That's all.

A. (Continuing.) Pardon me, Mr. Crane. At that time—

Q. (Interrupting.) And merely as an accommodation?

A. At that time I had a minor accident in the laundry and was off altogether, off about six weeks, and during [347—318] that time I went down during the day. That was the time I spoke of Miss Smith's illness the other time I was on the stand.

Q. Now, as a matter of fact, Mr. Hering, you were just down there helping out as accommodation to Mr. Deal?

A. Certainly, as I was requested to do.

Mr. CRANE.—That's all.

(Witness excused.)

TESTIMONY OF GEORGE BENTLEY, FOR DEFENDANTS.

GEORGE BENTLEY, called as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination.

(By Mr. CLARK.)

Q. Mr. Bentley, since you were on the stand have you, at the request of the attorneys for the defendants in this case, made up a stack of bills containing the same number that was in that package that was dispatched and measured the size of a package that would make? A. Yes, I have.

Q. Did you do it over here at the First National Bank? A. Yes, this morning.

Q. Did you put in the same number of bills that was in that package? A. Yes, exactly.

Q. Did you compress them as the package was compressed that was sent in that sack that day?

A. Yes. [348—319]

Q. Then did you measure the size of the package?

A. Yes.

Q. What were the measurements?

Mr. CRANE.—Just a minute, now, Mr. Bentley. Objected to, if the Court please, as incompetent, irrelevant and immaterial; the proper foundation has not been laid; and further, it is not shown that the bills used by Mr. Bentley in this experiment were new or old bills; and it has not been shown whether the bills sent that day were old or new bills, or that

(Testimony of George Bentley.)

the bills which he experimented with were the same condition as the bills sent that day.

Mr. CLARK.—I will ask a few more questions before I ask that, if the Court will permit.

Q. Do you remember the character of the bills that were sent out on that shipment, Mr. Bentley, that shipment of September, 1921?

A. Well, I have a fair recollection of what they were, yes.

Q. Were they new bills or old bills?

A. Most of them were new.

Q. In the package that you made up to-day, what kind of bills did you use?

A. I used mostly new ones.

Q. And did you endeavor—what did you do as regards making it as near like the original package as you could?

A. I endeavored to make it as near as I could, and I told them I wanted most of the tens and twenties new.

Q. And that is about what the other bills were that you shipped the other time? [349—320]

A. Yes, as I recollect they were mostly all new.

Q. The new bills and the old bills are about the same thickness?

A. Well, the new bill can become more compact than the old ones.

Q. And your package to-day was mostly new bills? A. Was mostly new bills, yes, sir.

Q. Of what were the denominations in that package which you made up comprised?

(Testimony of George Bentley.)

Mr. CRANE.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Did you put any silver in the package that you measured?

A. No, sir, I did not.

The COURT.—Sustain the objection.

Mr. CLARK.—Well, if the Court please, I want to call the Court's attention to this. All I am asking for is the denominations of the bills themselves. The testimony that the witness gave on the stand was that the silver was separate and distinct from the other package. All I am asking now is what size package those bills themselves would make. That is the reason, and I ask the Court to take that into consideration.

The COURT.—The objection is sustained.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

Mr. CLARK.—That's all, Mr. Bentley.

(Witness excused.) [350—321]

(Recess.)

TESTIMONY OF GEORGE PRESTON, FOR DEFENDANTS.

GEORGE PRESTON, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLARK.)

Q. Your name is George Preston? A. Yes.

(Testimony of George Preston.)

Q. You are the manager of the Northern Commercial Company of Alaska? A. Yes.

Q. At this place. You were formerly connected with the old Northern Commercial Company?

A. Yes.

Q. How long had you been connected with the Northern Commercial Company?

A. Oh, about twenty years.

Q. Do they maintain a hardware department in connection with their other business here at Fairbanks? A. Yes, they do.

Q. Do they sell nails? A. They sell nails.

Q. I will show you this nail and ask you if you can look at it and tell about what size you call that, what penny?

A. That's about an eight penny, I would say, ten penny. It is three inches. Eight penny nail I would call that.

Q. Do you know whether the Northern Commercial Company carries nails of that kind?

A. Yes, we do regularly. [351—322]

Q. Do you know whether the old Northern Commercial Company carried nails of that kind?

A. They always had. We couldn't be out of them.

Q. That is a staple article, is it not?

A. That is a staple article, yes.

Q. For how many years do you suppose the Northern Commercial Company carried nails of that character?

A. As long as they have been in the hardware business, I would say.

(Testimony of George Preston.)

Q. And were they sold to a select few people, or to anybody who came in for them?

Mr. CRANE.—Objected to as immaterial, if the Court please.

The COURT.—Overruled.

A. Well, it is an article of trade that anybody can procure.

Q. In the month of September, 1921, did the Northern Commercial Company carry nails of that size in stock? A. We must have had them.

Q. You always had them?

A. Couldn't have been without them, I don't think.

Mr. CLARK.—That's all.

Cross-examination.

(By Mr. CRANE.)

Q. Mr. Preston, isn't it a fact that most any first-class hardware store carries finishing nails?

A. Yes.

Q. No secret about it, is there? A. No.

Q. Nothing unusual about it? [352—323]

A. Nothing unusual about it at all.

Q. Buy finishing nails at any hardware store?

A. Yes, you should be able to do it.

Mr. CRANE.—That's all.

(Witness excused.)

Mr. CLARK.—Defendant rests.

(Whereupon the defendants rest their case in chief.) [353—324]

TESTIMONY OF J. E. FITZGERALD, FOR PLAINTIFF (IN REBUTTAL).

J. E. FITZGERALD, called in rebuttal as a witness on behalf of the plaintiff, further testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. Mr. Fitzgerald, you were investigating the rifling of registered parcel 1045 during September and October, 1921. I will ask you whether or not you informed Postmaster Deal that when the package arrived at Nenana it was found to contain a Popular Mechanics magazine?

A. I did.

Q. Did you show Mr. Deal that magazine?

A. I did.

Q. Did you make inquiry of Mr. Deal about magazines? A. I did.

Mr. CLARK.—One moment, if the Court please. We object to any testimony about making inquiries about magazines because no foundation was laid. He never asked Mr. Deal—he never asked the time, place or persons present.

Mr. CRANE.—During the investigation in September, 1921, relating to this.

Mr. CLARK.—I contend he laid no foundation because he fixed it in no definite place. If this is intended for impeachment I object as there is no foundation laid for it.

The COURT.—As I recall it, an affidavit was ten-

(Testimony of J. E. Fitzgerald.)

dered here by Mr. Deal which was sworn to before Mr. Wetzler, in which he stated all the facts at that time, and was asked particularly [354—325] if he had called it to the attention of the Postoffice Inspectors at the time that he made this affidavit, as I recollect it.

Mr. CLARK.—If the Court please, the affidavit was not in evidence. His testimony was merely negative in regard to what was in that affidavit.

The COURT.—Objection overruled.

Mr. CLARK.—Save an exception.

The COURT.—Exception allowed.

Q. I will ask you, Mr. Fitzgerald, if during your investigation at that time, or at any time during your investigation, Mr. Deal informed you that he had dispatched some magazines on the day of that mail? A. He did not.

Mr. ROTH.—We object to that. Well, it is answered.

The WITNESS.—I didn't finish the answer.

The COURT.—Objection overruled.

Q. Go ahead and finish it. A. He did not.

Q. Did you also in September and during your investigation ask Mr. Deal to keep a record of the next shipment of Popular Mechanics magazines to see who received them in the postoffice?

Mr. ROTH.—We object, if the Court please, as not cross-examination, and not impeaching, and not rebuttal testimony, and it is not an impeaching question; there is no foundation laid for it.

The COURT.—Objection sustained.

(Testimony of G. Wetzler.)

Mr. CRANE.—That is all, Mr. Fitzgerald.

Mr. CLARK.—That is all.

(Witness excused.) [355—326]

TESTIMONY OF G. WETZLER, FOR PLAINTIFF (RECALLED IN REBUTTAL).

G. WETZLER, called in rebuttal as a witness on behalf of the plaintiff, further testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. Mr. Wetzler, I will ask you if during your investigation of the rifling of registered parcel No. 1045 during the month of September, 1921, if you informed Postmaster Deal as to the contents of that registered parcel when it was received at Nenana?

A. Yes, sir, I did.

Q. Did you state to him that there was a magazine in the contents? A. I did.

Q. Did he at that time or during that investigation inform you or state to you that he had dispatched some magazines out on the morning of the 16th, or sent them out of the postoffice?

Mr. CLARK.—To which we object, if the Court please, as irrelevant, incompetent and immaterial, no foundation laid, and if it is intended as an impeaching question Mr. Deal's attention was not called to the time, place or persons present.

The COURT.—Overruled.

Mr. CLARK.—Exception.

The COURT.—Exception allowed.

(Testimony of G. Wetzler.)

A. He did not.

Q. Mr. Wetzler, were you in the postoffice on the morning of the 16th of September, 1921?

A. I was.

Q. Do you recall seeing any magazines tied up or going out [356—327] that morning?

A. I do not.

Mr. CRANE.—You may cross-examine.

Cross-examination.

(By Mr. CLARK.)

Q. Did you examine every sack that went out that morning, Mr. Wetzler? A. I did not.

Q. How many sacks went out that morning?

A. My knowledge is from the record down there. I don't recollect, but the record shows how many.

Q. Well, your own independent—all the recollection you have now in regard to the number was what you get from the record? A. Yes, sir.

Mr. CLARK.—That's all.

(Witness excused.)

TESTIMONY OF LILLIAN G. SMITH, FOR PLAINTIFF (RECALLED IN REBUTTAL).

LILLIAN G. SMITH, called in rebuttal as a witness on behalf of the plaintiff, further testified as follows:

Direct Examination.

(By Mr. CRANE.)

Q. Miss Smith, were you in the postoffice on the 16th of September, 1921? A. I was, yes, sir.

(Testimony of Lillian G. Smith.)

Q. You at this time recall of any magazines going out that [357—328] morning?

A. We sent magazines at different times, but I don't recollect that morning.

Q. Miss Smith, I hand you Plaintiff's Exhibit "C," containing Plaintiff's Exhibit "A," which is the canvas bag, which contains in the canvas bag the coin sack and coin, and wrapped in brown paper, and ask you if that package that I hand you now is about the same size—

The COURT.—(Interrupting.) And magazine.

Q. (Continuing.) —and the magazine in there, and ask you if that package is about the same size and weight as the package you put in the mail pouch that morning?

Mr. CLARK.—To which we object, if the Court please, as irrelevant, incompetent and immaterial, not rebuttal testimony, and it is not shown that the package is in the same condition that it was when it was received at Nenana, while it conclusively appears that when it was received at Nenana it was more compact than that and was fastened together with a nail, and that package is not in the condition it was, and this is not rebuttal testimony.

The COURT.—Objection overruled.

Mr. CLARK.—We note an exception.

The COURT.—Exception allowed.

Q. What is your answer?

A. Well, I think if the jacket were new the corners would be square, the creases along here (indi-

(Testimony of Lillian G. Smith.)

cating) would make a difference, but I would think the weight was about the same.

Q. And how about the size? [358—329]

A. Well, that way would be all right (indicating), but that way it seems a little bit flatter than the other Of course, I was in a hurry and just picked it up and walked straight to the pouch with it.

Mr. CRANE.—You may cross-examine.

Cross-examination.

(By Mr. CLARK.)

Q. Miss Smith, you say that the other jacket was squarer. When the package referred to was brought to you in that canvas sack it was practically square so far as the sides were concerned, was it?

A. Yes, sir.

Q. And when it was put in the container it had a compact, square appearance?

A. Yes, but the corners all stood out and the creases down the sides.

Q. The corners all stood out and the creases down the sides? A. Yes, sir.

Q. But this, there is no corners sticking out any place in that bundle, is there?

A. Well, the creases of the jacket would stand out more here and here (indicating) and the point stood out prominently.

Q. But so far as this package is concerned there is no corners of any description appear, do they, Miss Smith? A. Not now.

Q. And the package that you took out of the safe that morning felt the same and looked the

(Testimony of Lillian G. Smith.)

same as the one you had put in the night before when it did show [359—330] square corners and creases?

A. Well, that feels about the same weight but not the same size.

Q. Not the same size, and not the same shape?

A. Not that way (indicating). I think if you had a new jacket, though, it would be different.

Mr. CLARK.—That's all.

Redirect Examination.

(By Mr. CRANE.)

Q. Miss Smith, at the time you took this package, or a package similar to this, out of the safe, you took it directly out of the safe and put it in the sack without untying it, did you? A. Yes, sir.

Mr. CRANE.—That's all.

(Witness excused.)

Mr. CRANE.—The Government rests.

(Whereupon plaintiff rests its case in rebuttal.)

(Defendants rest.) [360—331]

That thereupon attorney for plaintiff made his opening argument to the jury and thereafter and before defendants' attorneys had addressed the jury and before the jury was instructed by the Court or had retired to consider their verdict or the cause had been submitted to said jury, defendants moved the Court to dismiss said action and to grant a nonsuit, which motion said Court then and there overruled, to which ruling defendants excepted, and said exception was allowed.

That defendants thereupon moved the Court to instruct the jury then engaged in the trial of said action to bring in a directed verdict in favor of defendants and against plaintiff, which motion the Court then and there overruled, to which said ruling defendants then and there excepted, and said exception was allowed.

That, before the trial of said cause was entered into, the defendants requested the Court to instruct the jury in writing, and among other instructions to instruct them as follows:

REQUESTED INSTRUCTIONS OF DEFENDANT.

(Proposed Instruction No. 1.)

"The Court instructs the jury that, if you find the defendant T. H. Deal was guilty of negligence, this would not entitle the plaintiff to recover, unless such negligence was the cause of plaintiff's loss, if it suffered loss."

(Proposed Instruction No. 2.)

"The Court instructs the jury that you cannot allow the plaintiff anything for loss suffered, unless you believe from the evidence that the loss was caused by the negligence of the defendant T. H. Deal."

(Proposed Instruction No. 3.)

"The Court instructs the jury that the plaintiff cannot recover from the defendants, unless you believe from the evidence that the loss suffered by the plaintiff was by reason of the negligence of the defendant T. H. Deal, in the manner alleged in the

complaint. If the loss was suffered in any other manner or from any other cause than those set forth in the complaint, the plaintiff cannot recover."

(Proposed Instruction No. 5.)

"The burden of proving negligence rests on the party alleging it, and where a person charges negligence on the part of another as a cause of action, he must prove the negligence by a preponderance of evidence. And in this case, if the jury find that the weight of the evidence is in [361—332] favor of the defendants or that it is equally balanced, then the plaintiff cannot recover and the jury should find the issues for the defendants."

(Proposed Instruction No. 6.)

"The jury are instructed that they have no right to guess or conjecture that the loss complained of by the plaintiff is the result of negligence on the part of the defendant T. H. Deal. Whether it is or not must be determined by the jury from the evidence. The jury is not to understand from this or any other instruction that the Court intends to intimate any opinion upon that or any other question of fact in this case. All such questions and matters are solely and exclusively for the jury, and they must determine them from the evidence, and from that alone."

(Proposed Instruction No. 7.)

"You are further instructed that the money alleged to have been lost from the registered package described in plaintiff's complaint was not deposited with the postmaster as government money, and even

if you should find, by a preponderance of the evidence, that said money was lost and that it was Government of the United States, you are instructed that said postmaster was only required to give to said registered package the same care and attention required by law and the United States postoffice regulations pertaining to any registered mail matter; and you are further instructed that neither he nor his bondsmen would be liable therefor, even though you should find, by a preponderance of the evidence, that said loss occurred while the package was still in the possession of the said United States postmaster at Fairbanks, Alaska, unless you should also find, by a preponderance of the evidence, that said loss was occasioned by the negligence of T. H. Deal, or by reason of the disregard of or violation by the postmaster of some law or regulation in regard to the handling of registered mail, described in plaintiff's complaint."

(Proposed Instruction No. 8.)

"The jury are further instructed that the plaintiff contends that the loss described in plaintiff's complaint was occasioned by reason of the carelessness and neligence of the Fairbanks postmaster T. H. Deal, and by reason of his violations of the rules and regulations prescribed by the United States Postoffice Department, and you are instructed that the plaintiff is confined by its pleadings to the negligence of the postmaster, as set forth in the complaint, and if you are satisfied, from a preponderance of the evidence, that the registered package described in plaintiff's complaint was rifled while

still in the Fairbanks postoffice, but that said loss was occasioned by the carelessness, negligence, or disregard of the law or regulations relative to registered packages, by a regularly appointed employee of the Fairbanks postoffice, regularly sworn as such postal employee and holding office by and with the concurrence of the Postmaster-General, then you are instructed that, under the said pleadings, you cannot find in favor of the plaintiff, but your verdict must be for the defendant, unless you are also satisfied, by a preponderance of the evidence, that said defendant T. H. Deal was negligent in employing incompetent help, or in improperly supervising said employees." [362—333]

(Proposed Instruction No. 9.)

"You are further instructed that, in this case, the general laws of the United States, regulations of the Postoffice Department, and conditions of the bond sued upon, dealing with the duties of the postmaster as a fiscal agent of the Government or as regards the postal savings system, are not applicable and should not be considered by you in arriving at a verdict in this case, as the duties of a postmaster in regard to registered mail are governed by separate and distinct laws and regulations from those fixing and defining his duties in the handling of government funds and postal savings."

(Proposed Instruction No. 13.)

"You are instructed that there was not in existence on the 15th and 16th days of September 1921 any regulation of the United States Postoffice Department requiring registered packages to be kept

in a safe, and that the regulations then existent provided that the registered matter be kept separate from ordinary mail matter and properly protected from accident or theft, and unless you are satisfied, by a preponderance of the evidence, that this regulation was violated by the postmaster at Fairbanks at that time, and that said violation was the cause of the depredation upon said registered package described in plaintiff's complaint, and that said depredation upon said registered package took place in the United States postoffice at Fairbanks, Alaska, then your verdict must be for the defendants."

(Proposed Instruction No. 14.)

"You are instructed that, before you can find a verdict in favor of the plaintiff in this action, you must be satisfied, from a preponderance of the evidence, of the following facts, to wit: (1) That a part of the contents of the registered package in question was abstracted before it was delivered to the person to whom it was addressed: (2) That said money was abstracted from said package while it was in the possession of, or under the direct control of T. H. Deal as postmaster at Fairbanks, Alaska, and before it passed out of his possession; (3) That said loss was caused by reason of the violation by said T. H. Deal as postmaster of some general law of the United States applicable to registered mail, or of a regulation of the Postoffice Department, pleaded in plaintiff's complaint; And unless you are satisfied, by a preponderance of the evidence, of the existence of the conditions above set forth then your verdict must be for the defendants."

(Proposed Instruction No. 15.)

"You are instructed that a postmaster of a United States postoffice is subject to the general laws of the United States applicable to postmasters, to the regulations duly promulgated by the Postoffice Department and communicated to said postmaster, and his bondsmen are liable for any loss or damage suffered by reason of the postmaster's violation of the law, or disregard of the regulations, provided such violation of the law or regulations is the cause of said loss."

(Proposed Instruction No. 16.)

"You are instructed that the United States postoffice regulations in force at the date of the alleged rifling of the registered package referred to in plaintiff's complaint [363—334] provided that all registered matter should be kept separate from ordinary matter and properly protected from accident or theft (Sec. 885, P. R. 1913), and unless you are satisfied, from a prepondenace of the evidence, that said registered package referred to in plaintiff's complaint was not kept separate from the ordinary mail matter and properly protected from accident and theft, and that it was taken from the possession of the postmaster at Fairbanks without any fault or negligence on the part of said postmaster, then your verdict should be for the defendants."

(Proposed Instruction No. 17.)

"You are further instructed that a postmaster is not an insurer of registered mail, and that, if he handles said registered mail in the manner pre-

scribed by law and the regulations of the Postoffice Department, then he is not liable for loss or depredation upon said registered mail while it is in his possession."

That, after the Court had instructed the jury, and before the jury had retired to consider their verdict, defendants, in open court, in the presence of said jury, renewed their motion for the Court to instruct the jury as above set forth, but the Court refused to give said instructions or any of them, to which refusal to the giving of said instructions and the refusal to give each of said instructions so proposed by the defendants, the defendants then and there excepted, and said exception was allowed.

That, at the conclusion of said trial and the arguments of the respective counsel, the Court instructed the jury as follows:

INSTRUCTIONS OF COURT TO THE JURY.

"Members of the Jury:

1.

You are instructed that this is a civil action instituted by the United States of America as plaintiff against T. H. Deal and the United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, defendants.

2.

The second amended complaint alleges that T. H. Deal is a citizen of the United States and a resident of the Fourth Division, Territory of Alaska and the defendant, the United States Fidelity and Guaranty Company, is a corporation organized under the laws of the State of Maryland, authorized

to do a general surety business within the Territory of Alaska.

3.

That on or about the 5th day of September, 1918, the said T. H. Deal was appointed and commissioned to be Postmaster at Fairbanks, Alaska, and on the 19th day of November, 1918, entered upon his duties as such postmaster, having duly qualified therefor.

That about the time of the appointment of said T. H. Deal as such postmaster and to procure the issuance of a commission to him as such, on or about the 19th day of November, 1918, the said T. H. Deal as principal, and the said United States Fidelity and Guaranty Company as surety, made, executed and delivered to the United States of America, [364—335] their joint and several obligations in writing, whereby they bound themselves, their heirs, executors, administrators, successors and assigns to pay the United States of America the sum of $26,000.00.

The said bond here referred to is in the words and figures following, to wit—omitting all matter not necessary for your consideration in this case:

"POSTOFFICE DEPARTMENT.

BOND OF POSTMASTER.

Know all men by these presents, That we, Thomas H. Deal, of Fairbanks, in the county of ——— State of Alaska, as principal, and U. S. Fidelity & Guaranty Co., Washington, D. C., as surety, do hereby bind ourselves, our heirs, executors, administrators,

successors, and assigns, jointly and severally, to pay to the United States of America the sum of twenty-six thousand dollars ($26,000.)

In witness whereof we have hereunto subscribed our names and affixed our seals this 19th day of November, in the year one thousand nine hundred and eighteen.

Whereas the above-bound Thomas H. Deal was on Sep. 5, 1918, appointed postmaster at Fairbanks aforesaid, and has duly executed the prescribed oath of office.

Now the condition of this obligation is, That if the said Thomas H. Deal shall faithfully discharge all duties and trusts imposed on him as postmaster either by law or by the regulations of the Postoffice Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulations made pursuant to law, in connection with the Postal Savings System, then this obligation shall be void; otherwise, of force.

T. H. DEAL.

Signed and sealed in the presence of:

WHITNEY W. CLARKE.

GRACE M. RALSTON.

UNITED STATES FIDELITY AND GUARANTY COMPANY.

By WM. H. WORMSTEDT,

Attorney-in-fact.

(Witnesses as to signature of officers or agents of surety company.)

K. WATERS.
C. JACKSON.

[Seal of Surety Company.]
Bond accepted Dec. 20, 1918.
For the Postmaster-General.

By J. C. KOONS,
First Assistant Postmaster-General.

CWL. C. R. H."

That the condition of said obligation is that the said T. H. Deal, after he had entered upon said office as postmaster at Fairbanks, Territory of Alaska, should faithfully discharge all the faiths and trusts imposed on him as such postmaster either by laws or by the regulations of the Post-office Department of the United States, and should faithfully act as a deliverer and pay to the proper officials or persons all moneys, money matter and other property of any kind that should come into his hands as such postmaster, and which should come into his hands by virtue of his occupancy of such position as postmaster to which he should be appointed and for which he should qualify, and said bond was duly accepted by said plaintiff.

That at the time of executing the obligation hereinbefore mentioned the said T. H. Deal as postmaster, subscribed [365—336] to the usual oath of office as provided for postmasters, a copy of said oath of office being as follows:

"I, Thomas H. Deal, having been appointed postmaster at Fairbanks, in the county of ——— and

State of Alaska, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter; so help me God.

I do further solemnly swear (or affirm) that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of postoffices and post roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States, which may come into my possession or control; so help me God.

T. H. DEAL.

Sworn to and subscribed before me, a Notary Public for the Territory of Alaska, this 19th day of November, 1918; and I certify that, to the best of my knowledge and belief, the person above named is of an age at which he is competent to contract by deed under the law on this bond.

[Official Seal] WHITNEY W. CLARKE,
Notary Public."

That the said T. H. Deal was the duly appointed, qualified and acting postmaster at Fairbanks, Territory of Alaska, from the 5th day of September, 1918, to and including the 16th day of November, 1922.

That on the 15th day of September, 1921, the First National Bank, a banking corporation of Fairbanks, Territory of Alaska, through its proper officers or employees, deposited in the United States Postoffice at Fairbanks, Alaska, a parcel containing $9937.65, in lawful money of the United States and property of the United States, for transmission through the mails to the Special Disbursing Officer of the Alaska Engineering Commission at Healy, Alaska, by way of Nenana, Alaska, and that said package or parcel of money was properly marked, postage prepaid and registered by the said bank, its officers or employees.

That while in the custody and under the care of the above-named defendant, T. H. Deal, who was at that time postmaster, the registered parcel or package aforesaid, due to the negligence of said T. H. Deal, and due to the disregard of the postal laws and regulations by said T. H. Deal, was opened and rifled and the sum of $9900.00 in currency of the United States was taken therefrom, and the said currency taken therefrom was the property of the United States of America.

That prior to and at the time of the depredation upon and loss from the registered package aforesaid the said defendant Deal, as postmaster, failed, refused and neglected to perform his duty as such with reference to said registered package of mail matter in the manner required by law, and violated the obligations of said bond and writing obligatory set out in the complaint of plaintiff herein, and hereinabove set out, and said defendant, as said

postmaster, failed to observe, perform and discharge the duties and trusts imposed upon him by law and the regulations of the Postoffice Department with reference to said registered package aforesaid, and failed and neglected to use ordinary care in handling the said registered package, and failed [366—337] and neglected to properly, protect and safeguard the said registered package as registered mail matter, and failed and neglected to handle said registered package as such in the manner prescribed by law and the regulations of the Postoffice Department, and handled the same in a careless and negligent manner, and in utter disregard of the law and the said regulations aforesaid, particularly of sections 361, 524, 940 and 1015 of the regulations of said Postoffice Department promulgated in 1913.

That by reason of the premises plaintiff herein sustained a loss of $9900.00. That the plaintiff has made demand upon the defendants for the sum of $9900.00, and they refuse to pay the same, and still refuse to pay, and that there is now due and owing from said defendants to the plaintiff herein the sum of $9900.00, together with interest thereon, That plaintiff prays judgment against the said defendants T. H. Deal, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, and each of them, in the sum of $9900.00, together with interest thereon, and for its costs and disbursements herein incurred.

The defendants T. H. Deal and the United States Fidelity and Guaranty Company of Baltimore,

Maryland, have filed separate answers to this complaint of the plaintiff.

The answer of the defendant T. H. Deal admits that the defendant Deal is a citizen of the United States, a resident of the Fourth Division of Alaska, and that the defendant United States Fidelity and Guaranty Company of Baltimore, Maryland, is a corporation organized under the laws of the State of Maryland and authorized to do a general surety business in this Territory; admits that on or about the 5th day of September, 1918, the said defendant Deal was appointed and commissioned to be postmaster at Fairbanks, Alaska, and that he entered on the duties of said office on the 19th day of December, 1918; also admits that he executed the bond referred to and set out in plaintiff's complaint, and hereinabove set out, as principal, and that the United States Fidelity and Guaranty Company executed the same as surety, as alleged in said complaint; also admits that the said Deal, at the time of executing the said bond, subscribed to the usual oath of office provided by law for postmasters, as set out and alleged in plaintiff's complaint and these instructions; also admits that the said defendant Deal was the acting postmaster at Fairbanks from the 5th day of September, 1918, to and including the 16th day of November, 1922.

The defendant Deal denies that this action is prosecuted at the request of the Treasury Department of the United States and under the authority of the Attorney General; denies that the First National Bank, a banking corporation at Fair-

banks, Territory of Alaska, on the 15th day of September, 1921, through its proper officers or employees, or otherwise, deposited in the United States Postoffice at Fairbanks, $9937.65, in lawful money of the United States, for transmission through the mails to the Special Disbursing officer of the Alaska Engineering Commission at Healy, Alaska, by way of Nenana, Alaska, and denies that said package or parcel of money was properly marked, postage prepaid and registered by the said bank, its officers or employees; and also denies that while in his custody and under his care as such postmaster the said registered parcel or package was opened and rifled as the result of his negligence or of his disregard of the Postal Regulations, or of either or both; and denies that the sum of $9900.00 in currency alleged to have been contained therein was the property [367—338] of and then belonged to the plaintiff, the United States and denies that any sum of money was taken from said registered package.

The defendant Deal further denies that during the time said registered package was in his care and custody he failed to properly, safeguard the mails and failed to use ordinary care in handling the same, and denies that he handled this package in a careless and negligent way; and denies that he disregarded or violated, either in part or at all, any of the postal laws and regulations pertaining to the accepting, guarding, caring for or handling registered mail; and further denies that he violated any postal laws and regulations, and particularly

denies that he violated sections 361 524, 940 and 1015 of said laws and regulations of 1913, in handling said package.

The defendant Deal further denies that the plaintiff herein sustained any loss in the sum of $9900.00 or in any other sum, by reason of any of the facts set forth in plaintiff's complaint; *a*but admits that the plaintiff made demand upon him and his codefendant, the United States Fidelity and Guaranty Company, for the sum of $9900.00, and that he and said company refused to pay the same, and still refuse to pay the same; and further denies that there is due and owing from the said defendant Deal to the plaintiff the sum of $9900.00, or any other sum.

In the separate answer filed by the defendant the United States Fidelity and Guaranty Company, of Baltimore, Maryland, a corporation, this defendant denies that this action is prosecuted at the request of the Treasury Department of the United States and under authority of the Attorney-General of the United States.

This defendant admits that the defendant T. H. Deal is a citizen of the United States and a resident of the Fourth Division of Alaska, and that this defendant, the United States Fidelity and Guaranty Company of Baltimore, Maryland, is a corporation organized under the laws of the State of Maryland, and is authorized to do a general surety business within this Territory.

This defendant admits that heretofore, to wit, on or about the 5th day of September, 1918, T. H. Deal was appointed and commissioned to be postmaster at Fairbanks, Alaska, and that he entered upon his duties as such Postmaster on the 19th day of November 1918, after having duly qualified.

This defendant admits that about the time of the appointment of said Deal as postmaster, and to procure the issuance of a commission to him as such postmaster, and on or about the 19th day of November, 1918, the said Deal as principal and this defendant as surety made, executed and delivered to the United States of America their joint and several obligation in writing, whereby they bound themselves, their heirs, executors, administrators, successors and assigns, to pay the United States of America the sum of $26,000.00, a copy of which said bond has been heretofore set out in these instructions.

This defendant further admits that the condition of said obligation was and is that the said T. H. Deal, after he had entered upon said office as postmaster at Fairbanks, Alaska, should faithfully discharge all the faiths and trusts imposed upon him as such postmaster either by laws or the regulations of the Postoffice Department of the United States, and should faithfully act as deliverer and pay to the proper officials or persons all moneys, money matter and other property of any kind that should come into [368—339] his hands by virtue of his occupancy of such position as postmaster,

and that said bond was thereafter duly accepted by the plaintiff.

This defendant further admits that at the time of the execution of said bond the said defendant Deal, as postmaster, subscribed to the usual oath of office provided for postmasters, and that a copy of said oath of office is in the words and figures as hereinabove set out in these instructions; and further admits that the bond heretofore mentioned was and is of the tenor and effect and in the words and figures hereinbefore set out in these instructions.

This defendant further admits that the said defendant Deal was the duly appointed, qualified and acting postmaster at Fairbanks, Alaska, from the 5th day of September, 1918, to and including the 16th day of November, 1922.

This defendant denies that on the 15th day of September, 1921, the First National Bank, a banking corporation of Fairbanks, Alaska, through its proper officers or employees, deposited in the United States postoffice at Fairbanks, Alaska, a parcel containing $9937.65, in lawful money of the United States and the property of the United States, for transmission through the mails to the Special Disbursing Officer of the Alaska Engineering Commission at Healy, Alaska, by way of Nenana, Alaska, and denies that said package or parcel of money was properly marked, postage prepaid and registered by the said bank, its officers or employees.

This defendant further denies that while in the custody and under the care of the defendant Deal, postmaster aforesaid, the said registered parcel or package was, by the negligence of said Deal and by his disregard of the postal laws and regulations, opened and rifled and the sum of $9900.00 in currency of the United States taken therefrom, and further denies that the said currency taken therefrom was the property of the United States of America, the plaintiff herein.

This defendant further denies that prior to and at the time of the depredation upon and loss from said registered package the defendant Deal failed, refused and neglected to perform his duty as postmaster with reference thereto in the manner required by law; and denies that he violated the obligations of his bond as postmasters hereinabove described; and further denies that the said Deal, as postmaster, failed to observe, perform or discharge the duties and trusts imposed upon him by law and the regulations of the Postoffice Department with reference to said registered package; and further denies that the defendant Deal failed and neglected to use ordinary care in handling the said registered package; and denies that he failed and neglected to properly, protect and safeguard the said registered package as registered mail matter; and denies that he failed and neglected to handle said registered package as such in the manner prescribed by law and the regulations of the Postoffice Department; and further denies that he han-

dled the same in utter disregard of the law and the said regulations, particularly sections 361, 524, 940 and 1015 of said regulations of said Postoffice Department, of date 1913.

This defendant further denies that the plaintiff herein has sustained a loss of $9900.00, or any other sum, but admits that the plaintiff has made demand upon the defendant Deal and this defendant for the sum of $9900.00, and that they both refuse to pay the same, and still refuse; and denies further that there is due and owing from this defendant, or from defendant Deal, or from both of them, the sum [369—340] of $9900.00, or any other sum, together with interest.

2.

You are instructed that in the trial of a civil action, the jury and Judge of the court have separate and distinct functions to perform. It is the duty of the jury to hear all the evidence in the case, and to decide, subject to the instructions of the Court, all questions of fact arising therefrom. It is the duty of the Judge of the court to decide all questions of law arising from the evidence, and to instruct you upon the law applicable to the facts and evidence in the case, and the law makes it your duty to accept as law what is laid down as such in these instructions.

3.

You are instructed that the issues of fact in this case as between the plaintiff and defendants, that is to say, what one alleges or affirms and the

other denies, must be decided and determined by you, and be so determined by you according to the preponderance of the evidence in favor of the one or the other. By preponderance of the evidence is meant the greater weight of the evidence when considered in connection with all the facts in evidence on both sides and the instructions of the Court as to the rules of evidence applicable to the facts in issue.

4.

The burden of proof is upon the plaintiff as to all matters of fact claimed by it affirmatively, and equally so upon the defendants as to all matters of fact affirmatively claimed by them and as between the parties, plaintiff and defendants, if you should find the evidence evenly balanced, or if the weight of the evidence is on the side of the defendants, you should then find for the defendants; otherwise you should find for the plaintiff, if the evidence preponderates in its favor.

5.

You are instructed that you are the sole judges of all questions of fact and of the credibility of all witnesses appearing before you, and of the weight and effect of the testimony and evidence; but your power in this respect is not arbitrary, but is to be exercised by you in subordination to the rules of evidence laid down in these instructions.

6.

The weight of the evidence is not necessarily determined by the greater number of witnesses pro-

duced on one side or the other, and in considering the evidence you are not bound to find a verdict in conformity with the declaration of testimony of any number of witnesses, when their evidence does not produce conviction in your mind, against a lesser number of witnesses or other evidence satisfying to your mind. Where the evidence is contradictory the finding shall be according to the preponderance of evidence. Evidence is to be weighed [370—341] and estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and the other to contradict, and therefore if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

7.

In determining the credit you will give to a witness, and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he or she has, if any, in the result of the trial; the motive he or she has in testifying, if any is shown; his or her relation to or feeling for or against any of the parties to the case; the probability or improbability of such witness' statements; the opportunity he or she had to observe and to be informed as to matters respecting which he or she gave testimony before you; and the inclination he or she evinced, in your

judgment, to speak the truth, or otherwise, as to matters within the knowledge of such witness. It is your duty to give to the testimony of each and all of the witnesses appearing before you, such credit as you consider the same justly entitled to receive.

8.

If you find that any witness has testified falsely in one part of his testimony in this case, you may distrust any part, or all, of the testimony of such witness. And if you believe from the evidence that any witness appearing before you in this case has wilfully testified falsely you are at liberty to reject the entire testimony of such witness; but you are not bound to reject the entire testimony of a witness because he has testified falsely in some part of his testimony; you should reject the false part, and may give to the other parts such weight as you may deem they are justly entitled to receive.

You should not fail to weigh and consider fairly and give proper weight to all testimony that you consider truthful, and not false.

9.

You are instructed that a witness may be impeached either by proof of contradictory statements or statements materially different and at variance with what he may have testified to upon the witness-stand. And if you believe that any witness in this case has been successfully impeached, you may disregard the testimony of such witness unless his testimony is corroborated by

other credible evidence in the case, and it is for you to say whether or not you will believe the witness sought to be impeached, or the witness brought to impeach him, as the law makes it incumbent upon the jury to determine the credibility of all the witnesses appearing and testifying before them in the trial of the case.

10.

You are also instructed that if you believe any witness has been successfully impeached or contradicted in regard to any matter or thing material to the issues in this case, as defined in these instructions, you will be justified in disregarding the entire testimony of such witness, except in so far [371—342] as his testimony may be corroborated by other credible evidence in the case, or by facts and circumstances proven on the trial.

11.

You are instructed, gentlemen of the jury, that there are two general classes of evidence, direct and circumstantial.

Evidence as to the existence of the main fact in issue is direct evidence, while circumstantial or presumptive evidence relates to the existence of facts which raise a logical inference as to the existence of the main fact in issue. When direct evidence cannot be produced reasonable minds will form their judgments on circumstances.

So in this case it is not necessary that the plaintiff produce direct evidence as to where the loss occurred, if such loss did occur, to the plaintiff, but it

may be inferred from all the circumstances in the case where such loss did occur.

You are instructed that circumstantial evidence is legal and competent evidence, and it is sometimes quite as convincing in its power as the direct and positive evidence of eye witnesses.

Circumstantial evidence is where some facts being proved, another fact, the main fact in issue, follows as a natural or very probable conclusion from the facts actually proved, or it is an inference of a fact from other facts proved; that is to say, circumstantial evidence is the proof of one fact by proving the existence of certain other facts. The fact to be proved by circumstantial evidence must, to the satisfaction of the jury, be reasonably, naturally and probably inferred from the existence of other facts proved.

In order to base your verdict upon circumstantial evidence, either in whole or in part, all the circumstances when taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty of the fact sought to be so proved. Such facts and circumstances must be shown as are not only consistent with the fact sought to be proved, but also inconsistent with any other reasonable theory and incapable of explanation upon any other theory.

12.

There is some evidence in this case as to oral admissions of the defendant T. H. Deal to persons

who have appeared before you as witnesses and testified to the same.

You are instructed that owing to the infirmity of the human mind and the inability of witnesses to repeat the exact language used by persons alleged to have made such oral admissions, and to understand it correctly and repeat it with all its intended meaning, you are to view the evidence as to such oral admissions with caution; but if you should find and believe that such oral admissions were actually made by the person or persons alleged to have made them, you should consider them as candidly and fairly as other evidence in the case and give them weight accordingly.

13.

You are instructed that the burden is on the plaintiff, who in this case is the United States of America, to prove not only the loss of the money enclosed in the registered package described in plaintiff's complaint, but also that said loss occurred while the package was in the possession of and under the control of the Postmaster at Fairbanks, Alaska, and that [372—343] the loss was occasioned by his carelessness or negligence by reason of his disregard of the law or regulations of the Postoffice Department pleaded in plaintiff's complaint, and unless the plaintiff proves every necessary fact by a preponderance of the evidence, then your verdict must be for the defendants.

14.

The Court instructs the jury that during the

period from the 14th day of September, 1921, to and including the 16th day of September, 1921, the Alaska Engineering Commission was an organization or Board created by act of Congress of the United States and maintained by appropriations from the United States Treasury of public moneys of the United States for the purpose of constructing and operating what is now known as the Alaska Railroad, in the Territory of Alaska; and if you find and believe from a preponderance of the evidence in this case that the Alaska Engineering Commission, by and through its Disbursing Agent at Healy, Alaska, requested, by letter, the First National Bank of Fairbanks, Alaska, to transmit to them at Healy, Alaska, via Nenana, Alaska, by registered mail, the sum of $9937.65 in United States currency and silver money in exchange for checks held and owned by the Alaska Engineering Commission, of the aggregate value of $9937.65; and if you further find and believe from a preponderance of the whole evidence that on the 15th day of September, 1921, the said First National Bank of Fairbanks, Alaska, pursuant to said request from said Alaska Engineering Commission, placed in a coin sack or canvas bag the said sum of $9937.65 in currency and silver, and sealed the said sack or bag and delivered the same in the usual and regular order of business to the proper official of the United States Postoffice at Fairbanks authorized to receive the same for the purpose of registering the said package according to the ordinary custom,

laws and regulations of the United States Postoffice Department, and that the said bag or package, and contents aforesaid, were so duly registered for transmission to the United States Postoffice at Nenana, Alaska, and properly addressed to the Alaska Engineering Commission at Healy, Alaska, via Nenana, then I instruct you that when said bag and contents were so delivered, and registered as aforesaid, into the custody of the United States Postmaster at the United States Postoffice at Fairbanks, Alaska, the same were then and thereafter the property of the United States of America, the plaintiff herein, and the said First National Bank of Fairbanks, Alaska, had no right, title or interest therein or thereto.

15.

You are instructed that the United States postal laws and regulations, and all amendments and supplements thereto, promulgated, pursuant to authority granted by act of Congress, by the Postmaster-General of the United States have the effect and force of law and are binding upon all Postmasters appointed by and under the authority of the President of the United States, and the legal duty devolves upon any postmaster to observe the same, and to require their observance by all his employees who are not themselves under bond, and the failure of any postmaster, which produces a loss, so to do with reference to the receiving, caring for and guarding of registered mail matter, and manner of handling and dispatching, renders such Postmaster

liable upon his official bond to any person injured or damaged, and to the extent of such injury or damage, where such loss occurs to such registered package, or contents [373—344] thereof, while it is in his custody, control and possession, and in such case it is not necessary for the person injured to show that the postmaster was guilty of any negligence other than the neglect of his official duty as imposed upon him by the said postal laws and regulations, and amendments and supplements thereto; and you are further instructed that the phrase or term "Postal Laws or Regulations," or "United States Postal Laws and Regulations," or "Laws and Regulations of the United States Postoffice Department," wherever the same, or either thereof, are or is mentioned in these instructions, is intended to mean and to include all amendments and supplements thereto promulgated by the Postmaster-General and in force and effect on and prior to the 16th day of September, 1921.

16.

You are instructed that the plaintiff in this case claims that the depredation upon and loss from the registered package in controversy was caused by the negligence of the defendant Deal and by his disregard of the postal laws and regulations governing the handling of registered packages; and in this connection you are instructed that the word "negligence" as herein used means the neglect of his official duty as such postmaster as those duties are defined by the United States postal laws and regulations.

17.

You are instructed that it is claimed by the plaintiff in this case that the defendant Deal knew that the registered package in controversy contained money belonging to the plaintiff herein, or that all the circumstances as disclosed by all the evidence in the case were sufficient to charge him with knowledge that said registered package in controversy contained money, the property of the plaintiff herein, and if you find and believe from a preponderance of the evidence in this case that when the said registered package was received into the United States postoffice at Fairbanks, Alaska, it was so received from the First National Bank of Fairbanks, Alaska, addressed to Frank T. Doner, Special Disbursing Agent of the Alaska Engineering Commission, at Healy, Alaska, via Nenana, Alaska, and that such package was an ordinary canvas or cloth sack, sealed at the top and heavy at one end, and that the person receiving it at the postoffice registry had reason to believe, and did believe, that it contained money, taking all the circumstances as disclosed by the evidence into consideration, and that the defendant Deal was present and assisting in dispatching the said package when contained in a paper jacket ordinarily used for enclosing registered packages, then I instruct you as a matter of law that the belief of the employee who received the said package into the postoffice as to the contents thereof is imputed by the law to the defendant Deal himself, and you, as jurors, would be warranted in assuming and

finding that under all the circumstances of the case he also believed the said registered package to contain money, and that said money was the property of plaintiff herein.

18.

You are instructed that if you are not satisfied by a preponderance of the evidence that the loss complained of in plaintiff's complaint was suffered while the registered package was in the possession of the postmaster at Fairbanks, Alaska, then your verdict must be for the defendants. [374—345]

19.

You are instructed that one of the conditions and obligations imposed upon the defendant Deal by his acceptance of the office of postmaster of the United States postoffice at Fairbanks, under the terms and conditions of the bond, which it is admitted he executed as principal and the defendant United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, executed as surety, is to the effect that the defendant Deal shall faithfully discharge all duties and trusts imposed upon him as postmaster, either by law or by the regulations of the Postoffice Department; and if you find and believe from a fair preponderence of the evidence in this case that the duties and trusts imposed upon the defendant Deal as postmaster, either by law or by the regulations of the Postoffice Department, required that, as such postmaster, before he should ship any registered package out of his office and on its way to its destination that he should enclose the same in a sealed

jacket, and that with reference to the registered package in controversy in this action he failed so to do, and that the said package, while in his care and custody, was rifled and any money, the property of the United States, removed therefrom, then and in that event the defendant Deal and the surety upon his official bond would be responsible for the loss occasioned by such removal, and in that event you should find a verdict for the plaintiff for an amount equal to the amount of money which you find to have been removed from said registered package.

20.

You are instructed that, to justify you in finding that the registered package referred to in plaintiff's complaint was rifled while in the possession of the defendant T. H. Deal, it is necessary not only that the circumstances should all concur to show that the loss was so suffered, but that they are inconsistent with any other rational conclusion.

21.

You are further instructed that if you find and believe from a preponderance of the evidence that the registered package in controversy in this action was not placed in a sealed jacket and the contents thereof witnesses, as required by the postal laws and regulations, by the defendant Deal personally, but that the same was done by the stamp clerk, who had been employed by the said Deal, as postmaster, only a month before, and that she had not theretofore received any instructions from the said defendant Deal as postmaster, or from anybody

in his behalf and under his supervision, with reference to the rules laid down by the United States postal laws and regulations concerning the handling, caring for, guarding and dispatching of registered packages, and that the defendant Deal failed in his duty in supervising the method employed by the said stamp clerk in so handling, caring for, guarding and dispatching said registered package in controversy, then I instruct you that the violation and disregard of the United States postal laws and regulations by the said stamp clerk is by the law imputed to the defendant Deal personally; and if you further find from a preponderance of the evidence that a loss occurred to the plaintiff in the sum of $9900.00, and that said loss occurred in the United States postoffice at Fairbanks, Alaska, and not elsewhere, under the above-mentioned conditions, you should find a verdict for the [375—346] plaintiff; otherwise your verdict should be for the defendants.

22.

You are instructed that the official oath of the defendant Deal as postmaster, among other things, contains the following provision:

> "and that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control: SO HELP ME GOD."

In this connection you are instructed that if you find and believe from a preponderance of all the evidence in the case that the defendant Deal knew that the registered package in controversy

contained money, and that said money was the property of the United States, and that the said registered package was looted and rifled of $9900.00 in currency while it was in his care and custody and control in the United States postoffice at Fairbanks, and that when the said registered package was dispatched from the said postoffice it had the bottom thereof torn open and fastened temporarily with an eight-penny or ten-penny finishing nail, and the sum of $9900.00 which it formerly contained had been abstracted and removed therefrom, and it then contained only $37 65 of the money which it had contained at the time it was delivered into the postoffice by the First National Bank, if you find from a preponderance of the evidence it was so delivered, and that at the time the said registered package left the said postoffice in the registry pouch it contained only $37.65 in silver, and a copy of the Popular Mechanics magazine, and a finishing nail holding the cut portions of the sack together and that thereby the plaintiff herein sustained a loss of $9900.00, and that the plaintiff has demanded from the defendants, and each of them, the payment of said sum of $9900.00, and that they, and each of them, have refused to pay the same, then I instruct you that you should return a verdict for the plaintiff, otherwise your verdict should be for the defendants.

23.

You are instructed that the United States postoffice regulations in force at the date of the alleged rifling of the registered package referred to in

plaintiff's complaint provided that all registered matter should be kept separate from ordinary matter and properly protected from accident or theft, and if you are satisfied from a preponderance of the evidence that said registered package referred to in plaintiff's complaint was kept separate from the ordinary mail matter and properly protected from accident and theft, and that it was taken from the possession of the postmaster at Fairbanks without any negligence or disregard of the postal laws and regulations on the part of said postmaster, then your verdict should be for the defendants.

In your consideration you are to be the judges, from all the evidence in the case, whether said registered package and contents were or were not kept separate from ordinary mail matter, and whether or not they were properly protected from accident or theft, in view of this regulation of the Postoffice Department governing the conduct of postmasters with reference to registered mail matter; and unless you find that they were not so kept separate and were not so properly protected from accident or theft, you cannot find a verdict for the plaintiff, but should return your verdict in favor of the defendants. [376—347]

24.

You are instructed that if you find and believe from a preponderance of the evidence in the case that a loss of $9,900.00 occurred to the plaintiff herein in the postoffice at Fairbanks, Alaska, and that the defendant Deal failed to fully lock the safe

in which was contained the registered package in controversy during the night of September 15, 1921, and morning of September 16, 1921, and that he did not use the full combination thereof for the purpose of locking it at said time, you should return a verdict for the plaintiff, otherwise your verdict should be for defendants.

25.

You are instructed that on the 15th and 16th day of September, 1921, the regulations of the United States Postoffice Department provided that postmasters would be held personally responsible by the Postoffice Department for depredation upon or loss of any registered letter or parcel, if such depredation or loss was due to negligence or disregard of the regulations of the Postoffice Department by the postmaster; and if you are satisfied a preponderance of the evidence that there was a depredations upon the registered package referred to in plaintiff's complaint on either of said dates, and before said package had left the possession of the postmaster at Fairbanks, then you are instructed that unless you also find by a preponderance of the evidence that said depredation upon said package and loss of the contents thereof was attributable to or was due to negligence and disregard by the postmaster of the law or regulations of the Postoffice Department, as alleged in plaintiff's complaint, then your verdict must be for the defendants.

26.

You are instructed that if you find and believe from a preponderance of the evidence that a loss of $9,900.00 occurred to the plaintiff in the United States postoffice at Fairbanks, Alaska; and if you further find that at any time during the period that he was postmaster in said postoffice and prior to the 16th day of September, 1921, the defendant Deal failed to change the combination on the safe in which the registered package in controversy was stored during the night of September 15, 1921, and the morning of September 16, 1921, until it was despatched from the said postoffice, then you should find a verdict for the plaintiff, otherwise your verdict should be for the defendants.

27.

You are instructed that if you find and believe from a preponderance of the evidence in this case that a loss occurred to the plaintiff herein in the United States postoffice at Fairbanks, Alaska, either on the night of September 15, 1921, or in the morning of September 16, 1921, from the registered package in controversy in this action, and that during said time, or any part of said time, the defendant Deal permitted unauthorized persons to have access to the work-room of the postoffice where said registered package was then kept or stored, you should return a verdict for the plaintiff herein; otherwise your verdict should be for the defendants. [377—348]

28.

You are further instructed that since you are the sole judges of all facts which have been proven in the trial, you should not permit remarks or expressions of opinions by counsel to influence your judgment, except as the same conforms to the facts proven, or are reasonably deducible from such facts and the law of the case as laid down in these instructions.

29.

The jury should endeavor to agree upon a verdict. No juror, for mere pride of opinion hastily formed or expressed, should refuse to agree, nor, on the other hand, should he surrender any conscientious views founded on the evidence. It is the duty of each juror to reason with his fellows concerning the facts with an honest desire to arrive at the truth and with a view of arriving at a unanimous verdict. It should be the object of all the jury to arrive at a common conclusion, and to that end to deliberate together with calmness. It is your duty to agree upon a verdict, if that is possible, without violating your conscientious convictions.

30.

You are instructed that you should consider no evidence sought to be introduced but excluded by the Court, nor should you consider any evidence stricken from the record by the Court, nor should you take into consideration in making up your verdict any knowledge or information known to

you, not derived from the evidence given by the witnesses on the witness-stand. Whatever verdict is warranted by the evidence under the instructions of the Court you should return, as you have sworn so to do.

31.

As you have been already instructed, your duty is to determine the facts of the case from the evidence submitted and these instructions, and the Court does not attempt to invade this scope of your duty, and does not intend by any single instruction or by the instructions as a whole to indicate how you shall find the facts or what your verdict shall be.

32.

You are instructed that it is manifestly impossible for the Court to cover the law of this case in merely one, or even a few, instructions, and therefore you should not single out any one instruction to the exclusion of all others as governing the decision of this case, but you should carefully and seriously consider all these instructions on the law of the case together and not disconnectedly.

Pursuant to these instructions I have prepared two forms of verdict which you will take into the jury-room, and you will sign,by your foreman, the one upon which you unanimously agree and return it into court as your verdict. The other form you will destroy.

The first form of verdict finds in favor of the plaintiff and the second in favor of the defendants.

Herewith I hand you these instructions for your guidance, together with such exhibits as have been introduced in evidence, and the pleadings in the case, and the forms of [378—349] verdict above mentioned.

CECIL H. CLEGG,
District Judge.

Dated at Fairbanks, Alaska, this 19th day of February, 1925.

(Endorsed: "Filed in the District Court, Territory of Alaska, 4th Div. Feb. 19, 1925. Rob't W. Taylor, Clerk. By E. A. Tonseth, Deputy.") [379—350]

After the Court had instructed the jury, and before the jury had retired to consider its verdict, and in the presence of said jury, and in open court, the defendants excepted to certain instructions given by the Court as follows:

EXCEPTIONS TO CERTAIN INSTRUCTIONS OF COURT.

To instruction No. 15, reading as follows:

"You are instructed that the United States postal laws and regulations, and all amendments and supplements thereto, promulgated, pursuant to authority granted by act of Congress by the Postmaster-General of the United States have the effect and force of law and are binding upon all postmasters appointed by and under the authority of the President of the United States, and the legal duty devolves upon

any postmaster to observe the same, and to require their observance by all his employees who are not themselves under bond, and the failure of any postmaster, which produces a loss, so to do with reference to the receiving, caring for and guarding of registered mail matter, and the manner of handling and dispatching, renders such postmaster liable upon his official bond to any person injured or damaged, and to the extent of such injury or damage, where such loss occurs to such registered package, or contents thereof, while it is in his custody, control and possession, and in such case it is not necessary for the person injured to show that the postmaster was guilty of any negligence other than the neglect of his official duty as imposed upon him by the said postal laws and regulations, and amendments and supplements thereto; and you are further instructed that the phrase or term 'Postal Laws or Regulations,' or 'United States Postal Laws and Regulations' or 'Laws and Regulations of the United States Postoffice Department,' wherever the same, or either thereof, are or is mentioned in these instructions, is intended to mean and to include all amendments and supplements thereto promulgated by the Postmaster-General and in force and effect on and prior to the 16th day of September, 1921."

and to that portion thereof which holds that the mere negligence of the postmaster, regardless of whether or not that was the moving cause of the loss,

makes the postmaster [380—351] and his bondsmen liable therefor.

Exception allowed.

The defendants except to instruction No. 16, reading as follows:

> "You are instructed that the plaintiff in this case claims that the depredation upon and loss from the registered package in controversy was caused by the negligence of the defendant Deal and by his disregard of the postal laws and regulations governing the handling of registered packages; and in this connection you are instructed that the word 'negligence' as herein used means the neglect of his official duty as such postmaster as those duties are defined by the United States postal law and regulations."

by reason of the omission therefrom of a statement that the neglect must be from the violation of the regulations as described in the complaint and not of the regulations as a whole.

Exception allowed.

The defendants except to instruction No. 17, reading as follows:

> "You are instructed that it is claimed by the plaintiff in this case that the defendant Deal knew that the registered package in controversy contained money belonging to the plaintiff herein, or that all the circumstances as disclosed by all the evidence in the case were sufficient to charge him with knowledge that said registered package in controversy con-

tained money, the property of the plaintiff herein; and if you find and believe from a preponderance of the evidence in this case that when the said registered package was received into the United States postoffice at Fairbanks, Alaska, it was so received from the First National Bank of Fairbanks, Alaska, addressed to Frank T. Doner, Special Disbursing Agent of the Alaska Engineering Commission, at Healy, Alaska, via Nenana, Alaska, and that such package was an ordinary canvas or cloth sack, sealed at the top and [381—352] heavy at one end, and that the person receiving it at the postoffice for registry had reason to believe, and did believe, that it contained money, taking all the circumstances as disclosed by the evidence into consideration, and that the defendant Deal was present and assisting in despatching the said package when contained in a paper jacket ordinarily used for enclosing registered packages, then I instruct you as a matter of law that the belief of the employee who received the said package into the postoffice as to the contents thereof is imputed by the law to the defendant Deal himself, and you, as jurors, would be warranted in assuming and finding that under all the circumstances of the case he also believed the said registered package to contain money, and that said money was the property of the plaintiff herein."

and to that portion thereof which sets forth that the belief of an employee as to the contents of the

package shall be imputed to be the belief of the postmaster himself, and that the jury would be warranted in assuming and finding that under the circumstances the postmaster could be deemed to have believed that the package contained money.

Exception allowed.

The defendants except to instruction No. 19, reading as follows:

"You are instructed that one of the conditions and obligations imposed upon the defendant Deal by his acceptance of the office of postmaster of the United States Postoffice at Fairbanks under the terms and conditions of the bond, which it is admitted he executed as principal and the defendant United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, executed as surety, is to the effect that the defendant Deal shall faithfully discharge all duties and trusts imposed upon him as postmaster, either by law or by the regulations of the Postoffice Department; and if you find and believe from a fair preponderance of the evidence in this case that the duties [382—353] and trusts imposed upon the defendant Deal as postmaster, either by law or by the regulations of the Postoffice Department, required that, as such postmaster, before he should ship any registered package out of his office and on its way to its destination that he should enclose the same in a sealed jacket, and that with reference to the registered package in controversy in this action he failed so to

do, and that the said package, while in his care and custody, was rifled and any money, the property of the United States, removed therefrom, then and in that event the defendant Deal and the surety upon his official bond would be responsible for the loss occasioned by such removal, and in that event you should find a verdict for the plaintiff for an amount equal to the amount of money which you find to have been removed from said registered package."

for the reason that it does not limit the postmaster or his bondsman's liability to negligence or violation of the instructions which are the cause of the loss suffered, and that the instruction is contrary to law.

Exception allowed.

The defendants except to instruction No. 21, reading as follows:

"You are further instructed that if you find and believe from a preponderance of the evidence that the registered package in controversy in this action was not placed in a sealed jacket and the contents thereof witnessed, as required by the postal laws and regulations, by the defendant Deal personally, but that the same was done by the stamp clerk, .who had been employed by the said Deal, as postmaster, only a month before, and that she had not theretofore received any instructions from the said defendant Deal as postmaster, or from anybody in his behalf and under his supervision, with reference to the rules laid down by the United

States postal laws and regulations concerning the handling, caring for, guarding and dispatching of registered packages, and that the defendant Deal failed in his duty in supervising the method employed by the said stamp clerk in so handling, caring for, guarding and despatching said registered [383—354] package in controversy, then I instruct you that the violation and disregard of the United States postal laws and regulations by the said stamp clerk is by the law imputed to the defendant Deal personally; and if you further find from a preponderance of the evidence that a loss occurred to the plaintiff in the sum of $9,900.00, and that said loss occurred in the United States Post-office at Fairbanks, Alaska, and not elsewhere, under the above-mentioned conditions, you should find a verdict for the plaintiff; otherwise your verdict should be for the defendants."

for the reason it sets forth an instruction upon a state of facts not in evidence; that is to say, that the stamp clerk did not have instructions from the Postmaster Deal in regard to how to perform her duty, and how to handle, guard and dispatch the mail; and for the further reason that said instruction makes the postmaster an insurer of registered mail regardless of whether or not any loss thereto was suffered by reason of his negligence, and is contrary to law.

Exception allowed.

The defendants except to instruction No. 22, reading as follows:

"You are instructed that the official oath of the defendant Deal as postmaster, among other things, contains the following provision:

'and that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control: SO HELP ME GOD.'

In this connection you are instructed that if you find and believe from a preponderance of all the evidence in the case that the defendant Deal knew that the registered package in controversy contained money, and that said money was the property of the United States, and that the said registered package was looted and rifled of $9,900.00 in currency while it was in his [384—355] care and custody and control in the United States Postoffice at Fairbanks, and that when the said registered package was despatched from the said postoffice it had the bottom thereof torn open and fastened temporarily with an eight-penny or ten-penny finishing nail, and the sum of $9,900.00 which it formerly contained had been abstracted and removed therefrom, and it then contained only $37.65 of the money which it had contained at the time it was delivered into the postoffice by the First National Bank, if you find from a preponderance of the evidence it was so delivered, and that at the time the said registered package left the said postoffice in the registry pouch

it contained only $37.65 in silver, and a copy of the Popular Mechanics magazine, and a finishing nail holding the cut portions of the sack together, and that thereby the plaintiff herein sustained a loss of $9,900.00, and that the plaintiff has demanded from the defendants and each of them, the payment of said sum of $9,900.00, and that they, and each of them, have refused to pay the same, then I instruct you that you should return a verdict for the plaintiff; otherwise your verdict should be for the defendants."

in that it makes a postmaster an insurer of registered mail and is contrary to the express provisions of postoffice regulation 940, and is contrary to law and contrary to the decision of the courts in regard thereto.

Exception allowed.

The defendants except to instruction No. 23, reading as follows:

"You are instructed that the United States postoffice regulations in force at the date of the alleged rifling of the registered package referred to in plaintiff's complaint provided that all registered matter should be kept separate from ordinary matter and properly protected from accident or theft, and if you are satisfied from a preponderance of the evidence that said registered package referred to in plaintiff's complaint was kept separate from the ordinary mail matter and properly protected

from accident and theft, and that it was taken from the possession of the postmaster at [385—356] Fairbanks without any negligence or disregard of the postal laws and regulations on the part of said postmaster, then your verdict should be for the defendants.

In your consideration you are to be the judges, from all the evidence in the case, whether said registered package and contents were or were not kept separate from ordinary mail matter, and whether or not they were properly protected from accident or theft, in view of this regulation of the Postoffice Department governing the conduct of Postmasters with reference to registered mail matter; and unless you find that they were not so kept separate and were not so properly protected from accident or theft, you cannot find a verdict for the plaintiff, but should return your verdict in favor of the defendants."

and to that portion of said instruction which holds that the postmaster or his bondsman would be liable in the event of their disregard of the postal laws and regulations on the part of the postmaster regardless of whether or not said disregard was the cause, or the moving cause, of the loss suffered, if any loss was suffered, and is contrary to law.

Exception allowed.

The defendants except to instruction No. 24, reading as follows:

"You are instructed that if you find and believe from a preponderance of the evidence in the case that a loss of $9900.00 occurred to the plaintiff herein in the postoffice at Fairbanks, Alaska, and that the defendant Deal failed to fully lock the safe in which was contained the registered package in controversy during the night of September 15, 1921, and morning of September 16, 1921, and that he did not use the full combination thereof for the purpose of locking it at said time, you should return a verdict for the plaintiff, otherwise your verdict should be for defendants."

in that it makes the postmaster an insurer of registered mail, and does not provide that the disregard of the [386—357] regulations or the negligence therein referred to must have been the cause of the loss suffered, and is contrary to law.

Exception allowed.

The defendants except to instruction No. 26, reading as follows:

"You are instructed that if you find and believe from a preponderance of the evidence that a loss of $9900.00 occurred to the plaintiff in the United States Postoffice at Fairbanks, Alaska; and if you further find that at any time during the period that he was postmaster in said Postoffice and prior to the 16th day of September, 1921, the defendant Deal failed to change the combination on the safe in which the registered package in contro-

versy was stored during the night of September 15, 1921, and the morning of September 16, 1921, until it was dispatched from the said postoffice, then you should find a verdict for the Plaintiff; otherwise your verdict should be for the defendants."

on the ground that it is contrary to law in that it does not provide that the loss suffered must be attributable to the negligence of the postmaster or to the disregard of the postoffice regulations, and it makes him an insurer of registered mail.

Exception allowed.

The defendants except to instruction No. 27, reading as follows:

"You are instructed that if you find and believe from a preponderance of the evidence in this case that a loss occurred to the plaintiff herein in the United States postoffice at Fairbanks, Alaska, either on the night of September 15, 1921, or in the morning of September 16, 1921, from the registered package in controversy in this action, and that during said time, or any part of said time, the defendant Deal permitted unauthorized persons to have [387—358] access to the work-room of the postoffice where said registered package was then kept or stored, you should return a verdict for the plaintiff herein; otherwise your verdict should be for the defendants."

for the same reasons as last set forth to the last instruction, in that it makes the postmaster liable

for any loss in the event he has violated any of the regulations regardless of whether or not said violations were the cause of the loss.

Exception allowed. [388—359]

That, after the argument of counsel and the instructions of the Court, the jury retired to consider their verdict, and thereafter and on the 20th day of February, 1925, said jury returned into court with their verdict, which was in the words and figures following, to wit:

(Title of Court and Cause.)

We, the Jury, duly impaneled and sworn to try herein and determine the issue to the above-entitled cause, do hereby find and return a verdict in favor of the plaintiff and against the defendants, and that the plaintiff is entitled to recover from the defendants the sum of $9,900.00 with interest thereon at the rate of 8% per annum, from the 16th day of September, 1921.

Dated at Fairbanks, Alaska, this 20th day of February, 1925.

C. H. LaBOYTEAUX,
Foreman.

Which said verdict was received and filed.

That thereafter and within the time allowed by law and the orders of the Court, defendants filed their motion for a new trial, which was as follows:

(Title of Court and Cause.)

Come now the defendants in the above-entitled cause and move the Court for an order setting aside the verdict of the jury rendered in the above-

entitled cause and granting to the defendants herein a new trial, for the following reasons, to wit:

(1) For the reason that said verdict was contrary to law.

(2) Because said verdict is not sustained by the evidence and is contrary to the evidence.

(3) That, from all the evidence, it appears that the registered package referred to in plaintiff's second amended complaint left the Fairbanks postoffice intact and unrifled on the sixteenth day of September, 1921, and that any depredation upon said package occurred after it left the postoffice at Fairbanks, Alaska.

(4) That said verdict was evidently rendered in passion or prejudice and was contrary to the law and the evidence.

(5) For errors in law occurring at the trial and excepted to by defendants at the time, among others being the following, to wit:

(a) The Court erred in refusing to permit George Bentley to testify as to the dimensions of the package made up by him as an exact duplicate of the original package of currency registered by the bank on the fifteenth day of September, 1921.

(b) The Court erred in admitting in evidence regulations of the Postoffice Department not pleaded in plaintiff's second amended complaint.

(c) The Court erred in admitting in evidence specific alleged acts of negligence on the part of the defendant T. H. Deal when said acts were not pleaded in plaintiff's second amended complaint. [389—360]

(d) The Court erred in its ruling that the money contained in the registered package became Government money and that the postmaster, T. H. Deal, became an insurer thereof and was charged as an insurer.

(e) The Court erred in excluding the testimony of the witness Neil as regards the interpretation of the regulations of the United States postoffice.

(f) The Court erred in giving instruction No. 15, for the reason that said instruction is contrary to law and the postoffice regulations, makes the postmaster an insurer of registered mail, and is contrary to section 940 of the regulations of the Postoffice Department in full force and effect on the fifteenth and sixteenth days of September, 1921, and said instruction is further erroneous in that it makes the postmaster chargeable with enforcing obedience to the regulations by employees not under bond, for the reason that there is no provision of the postoffice regulations or of law so holding.

(g) The Court erred in giving instruction No. 16, as it enlarges the scope of plaintiff's second amended complaint and does not limit the Government to the acts of negligence set forth in said second amended complaint, and is contrary to law.

(h) The Court erred in giving instruction No. 17, as it is contrary to law, holds the postmaster responsible for a belief of an employee of the postoffice, regardless of whether or not that belief was communicated to the postmaster, and regardless of whether or not he had any knowledge of the

facts on which said belief might be based, and holds the postmaster as an insurer of registered mail, which is contrary to law and to the regulations.

(i) The Court erred in giving instruction No. 19, as said instruction is contrary to law and makes the postmaster responsible on his official bond for any negligence or disregard of the postal regulations, regardless of whether or not such negligence or disregard of the regulations was the cause of or had anything to do with the loss alleged to have been suffered by the plaintiff.

(j) The Court erred in giving instruction No. 21, as said instruction is contrary to law, makes the postmaster an insurer of registered mail, contrary to section 940 of the postal regulations, and assumes a state of things not in evidence and concerning which no evidence whatsoever was given; that is to say, that no instructions had been given by the defendant Deal as postmaster to Miss Lilian Smith in reference to the rules laid down by the postal laws and regulations concerning the handling, caring for, guarding and dispatching of registered packages, and assumes a state of things that did not exist.

(k) The Court erred in giving instruction No. 22, as said instruction is contrary to law and contrary to the provisions of section 940 of the postal laws and regulations, in effect makes the postmaster an insurer of registered mail, and assumes a state of facts that did not exist and concerning which there is no evidence, to wit, that the defendant Deal

at any time had any knowledge that the package contained money, and does not make any loss suffered by the plaintiff contingent on it being the result of any negligence or disregard of the regulations by the defendant T. H. Deal, and in effect instructs the jury to bring in a verdict for the plaintiff.

(l) The Court erred in giving that portion of instruction [390—361] No. 23 which reads "or disregard of the postal laws and regulations on the part of the postmaster," on the ground that the same is contrary to law and in effect instructs the jury that, if the defendant T. H. Deal violated any of the regulations of the postoffice department, whether or not they were regulations pleaded in plaintiff's second amended complaint, or whether or not the disregard of said regulations had anything to do with the alleged loss of the money, the defendant would be liable.

(m) The Court erred in giving instruction No. 24, on the ground that it is contrary to law and in effect holds that said T. H. Deal was liable on his official bond by reason of his failure to lock the safe on other than the day combination, regardless of whether or not that fact had anything to do with the loss of said money.

(n) The Court erred in giving instruction No. 26, on the ground that it is contrary to law and contrary to the regulations of the Postoffice Department, in that it makes the defendant Deal responsible on his official bond for failure to change

the combination on the safe, even though that had nothing whatever to do with the loss of said money, and further in that it makes him an insurer of registered mail.

(o) The Court erred in giving instruction No. 27, on the ground that the same is contrary to law, and is not based on any law or regulation, and in effect instructs the jury that, is the defendant Deal allowed any unauthorized person in the workroom of the postoffice and the Government suffered a loss the said Deal would be responsible on his official bond, regardless of whether or not such admission of an anauthorized person into the workroom had anything to do with the loss of said money.

(p) The Court erred in refusing to give defendants' proposed instructions Nos. 1, 2, 3, 6, 7, 8, 14, 15, 16 and 17, for the reason that said proposed instructions are correct statements of the law, and the defendants were prejudiced by the Court's refusal and failure to give the same.

(q) The Court erred in instructing the jury, by inference, that it was necessary for the postmaster to provide himself with a safe, within which to keep registered mail.

(r) The Court erred in denying and overruling defendants' objections to the introduction of any evidence in this cause on the ground that plaintiff's second amended complaint fails to set forth a cause of action against the defendants, or either of them.

(s) The Court erred in overruling defendants' motion for a nonsuit at the close of plaintiff's case.

(t) The Court erred in refusing to dismiss said action on the motion made by the defendants after the close of all the testimony and at the conclusion of plaintiff's opening argument.

(u) The Court erred in refusing to instruct the jury to bring in a verdict in favor of the defendants on defendants' motion made after the introduction of all the testimony and at the conclusion of plaintiff's opening argument.

(v) The Court erred in admitting any testimony in said cause and in admitting evidence objected to by the defendants at the time the same was offered.

(w) The Court erred in holding and ruling and in instructing the jury that, because the registered package contained money belonging to the Government of the United States the defendant T. H. Deal was deemed to have received said registered package as money of the United States, subject to the same rules and regulations and liabilities as pertain to postal savings and other moneys of the United States coming [391—362] into the possession of a postmaster as postal funds, and said holding and ruling is against law and is contrary to the regulations of the Postoffice Department in that respect made and provided.

Wherefore the defendants pray that the verdict of said jury be set aside and that defendants be granted a new trial.

Dated at Fairbanks, Alaska, on this, the —— day of ——, A. D. one thousand nine hundred twenty-five.

R. F. ROTH,
Attorney for Defendant T. H. Deal.
JOHN A. CLARK,
Attorney for Defendant United States Fidelity & Guaranty Company, a Corporation.

(Endorsed: "Due service hereof admitted this 25 February, 1925. E. B. Collins, Sp. Asst, Attorney, for Plaintiff." "Filed in the District Court, Territory of Alaska, 4th Div. Feb. 25, 1925 Rob't W. Taylor, Clerk. By E. A. Tonseth, Deputy.") [392—363]

That, thereafter, said motion for a new trial came on regularly for hearing before the above-entitled court, and after argument by counsel, the Court overruled said motion for a new trial, to which defendants excepted, and exception allowed, and thereupon signed the judgment, which is as follows:

(Title of Court and Cause.)

This cause came on regularly for trial before a jury on the 16th doy of February, 1925, the plaintiff appearing by Julien A. Hurley, United States Attorney and Fred D. Crane, Assistant United States Attorney, and the defendant, T. H. Deal, appearing in person and by his attorney, R. F. Roth, and the United States Fidelity and Guar-

anty Company of Baltimore, Maryland, a Corporation, appearing by its attorney, John A. Clark, whereupon a jury was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendants were sworn and examined and documentary evidence was introduced by the respective parties and the said trial continued from day to day, and after the respective parties herein had introduced their evidence, and after the arguments of the counsel and instructions of the Court, the jury retired to consider of their verdict, and on February 20th, 1925, said jury returned into court and being called, answered to their names, and thereupon rendered a verdict as follows:

We, the jury, duly impaneled and sworn to try herein and determine the issues to the above-entitled cause, do hereby find and return a verdict in favor of the plaintiff and against the defendants, and that the plaintiff is entitled to recover from the defendants the sum of $9,900.00 with interest thereon at the rate of 8% per annum, from the 16th day of September, 1921.

Dated at Fairbanks, Alaska, this 20th day of February, 1925.

C. H. LaBOYTEAUX,
Foreman.

That afterwards, to wit, on the 25th day of February, 1925, the defendants T. H. Deal and the United States Fidelity and Guaranty Company, filed herein their motion for a new trial, that there-

after, on the 26th day of February, 1925, said motion for a new trial was presented by the defendants, and argued by the respective counsels herein, and the Court being fully advised in the premises, overruled said defendants' motion for a new trial.

Wherefore, by virtue of the law and the reasons of the premises aforesaid, it is hereby ordered and adjudged that the plaintiff herein, the United States of America, do have and recover from the defendants, T. H. Deal and the United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, and each of them, the sum of $9,900.00, together with interest thereon at the rate of 8% per annum from the 16th day of September, 1921.

That the plaintiff do have and recover from said defendants, plaintiff's costs and disbursements incurred in said action to be taxed.

Dated this 3d day of March, 1925.

CECIL H. CLEGG,
District Judge.

It is hereby ordered that a stay of execution be granted until April 27th, 1925.

CECIL H. CLEGG,
Judge.

(Endorsed: Filed in the District Court, Territory of Alaska, 4th Div., Mar. 3, 1925. Rob't W. Taylor, Clerk. By Claire Stanfield, Deputy.) [393—364]

That, subsequent to the rendition of said judgment and on or about the 29th day of April, 1925, the plaintiff above named filed their amended

memorandum of costs and disbursements, which was as follows:
(Title of Court and Cause.)

AMENDED MEMORANDUM OF COSTS AND DISBURSEMENTS.

Marshal fees	$ 34.00
Clerk's fees	35.35
Witness fees:	
A. H. Keller—Subpoenaed from Seattle, Washinton.	
32 days at $4.00 per day	128.00
940 miles at .15 per mile	141.00
3680 miles at .05 per mile	184.00
L. A. Fairborn—Subpoenaed from Nenana, Alaska.	
8 days at $4.00 per day	32.00
244 miles at .15 per mile	36.60
Frank Doner—Subpoenaed from Aberdeen, Washington.	
36 days at $4.00 per day	144.00
940 miles at .15 per mile	141.00
3940 miles at .05 per mile	197.00
George Bentley—Subpoenaed from Berkeley, California.	
34 days at $4.00 per day	136.00
940 miles at .15 per mile	141.00
5610 miles at .05 per mile	280.00
Mrs. E. A. Williams—Subpoenaed from Anchorage, Alaska.	

10 days at $4.00 per day	40.00
712 miles at .15 per mile	106.80
P. O. Wrangstedt—Subpoenaed from Portland, Oregon.	
28 days at $4.00 per day	112.00
940 miles at .15 per mile	141.00
4054 miles at .05 per mile	202.70
B. Tunison—Subpoenaed from Nenana, Alaska.	
7 days at $4.00 per day	28.00
118 miles at .15 per mile	17.70
A. A. Lyden—Subpoenaed from Healy, Alaska.	
4 days at $4.00 per day	10.00
224 miles at .15 per mile	33.60
R. R. Robinson—Subpoenaed from Chatanika, Alaska.	
8 days at $4.00 per day	32.00
78 miles at .15 per mile	11.70
G. B. Erwin—Subpoenaed from Fairbanks, Alaska.	
2 days at $4.00 per day	8.00
Fred Struthers—Subpoenaed from Fairbanks, Alaska.	
1 day at $4.00 per day	4.00
W. B. Raeburn—Subpoenaed from San Fernando, California.	
34 days at $4.00 per day	136.00
940 miles at .15 per mile	141.00
6448 miles at .05 per mile	322.40

Evalyn Houck—Subpoenaed from Fairbanks, Alaska.

5 days at $4.00 per day 20.00

James Hagan—Subpoenaed from Nenana, Alaska.

5 days at $4.00 per day 20.00

118 miles at .15 per mile 17.70

Whitney Clark—Subpoenaed from Fair-Banks, Alaska.

1 day at $4.00 per day $4.00

Larry Lillico—Subpoenaed from Fairbanks, Alaska.

1 day at $4.00 per day $4.00

[394—365]

E. A. Hering—Subpoenaed from Fairbanks, Alaska.

2 days at $4.00 per day 8.00

J. S. Rodebaugh — Subpoenaed from Fairbanks, Alaska.

1 day at $4.00 per day 4.00

Levi Lindgren—Subpoenaed from Fairbanks, Alaska.

2 days at $4.00 per day 8.00

John Nordbye—Subpoenaed from Fairbanks, Alaska.

1 day at $4.00 per day 4.00

H. Amend—Subpoenaed from Nenana, Alaska.

1 day at $4.00 per day 4.00

118 miles at .15 per mile 17.70

E. A. Mack—Subpoenaed from Fairbanks, Alaska.
1 day at $4.00 per day 4.00

Total $3098.45

United States of America,
Territory of Alaska,
Fourth Division,—ss.

Fred D. Crane, Assistant United States Attorney, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff, United States of America, in the above-entitled cause, and as such is better informed relative to the above-entitled costs and disbursements than the said plaintiff. That the items in the above memorandum contained are correct, to the best of this deponent's knowledge*d* and belief, and that said disbursements have been necessarily incurred in the said cause.

FRED D. CRANE.

Subscribed and sworn to before me this 30th day of April, 1925.

E. B. COLLINS,
Notary Public in and for the Territory of Alaska.
My commission expires 18th day of Nov., 1927.

(Endorsed: "Defendants' objections to amended cost bill are hereby overruled. April 30th, 1925. Rob't W. Taylor, Clerk."

"Filed in the District Court, Territory of Alaska, 4th Div. Apr. 30, 1925. Rob't W. Taylor, Clerk. By E. A. Tonseth, Deputy.")

That, thereafter and on the 30th day of April, 1925, defendants filed their objections and exceptions to said amended memorandum of costs and disbursements, as follows: [395—366]

[Title of Court and Cause.]

EXCEPTIONS TO AMENDED MEMORANDUM OF COSTS AND DISBURSEMENTS.

Come now the defendants above named and object and except to plaintiff's amended memorandum of costs and disbursements filed herein and to the various items thereof, as follows, to wit:

(1) Except and object to the witness fees of the witnesses A. H. Keller, L. A. Fairborn, P. O. Wrangstedt (P. W. Ranstedt), Frank Doner, George Bentley, Mrs. E. A. Williams, and W. B. Raeburn, and to each of them, and to the various items charged as witness fees and mileage of each of said witnesses, for the following reasons, to wit: (a) That it is apparent from said amended memorandum of costs and disbursements that each of said witnesses was subpoenaed at a distance of more than one hundred miles, from the town of Fairbanks, and that none of said witnesses were subpoenaed in the manner prescribed by the law applicable to the Territory of Alaska and particularly in accordance with the provisions of section 1462 of the Compiled laws of Alaska, and that none of said witnesses are entitled to any compensation

for a longer period of time than the actual number of days they were in attendance upon the trial of said action and the time it took each of said witnesses to travel one hundred miles each way, coming to and returning from the place where said trial was had. (b) That all said witnesses, and each of said witnesses, are, in contemplation of law, witnesses who vountarily appeared from beyond the limits of a subpoena and being such they would only be entitled to mileage for one [396—367] hundred miles each way and for a per diem for the time necessarily consumed in traveling one hundred miles each way to and from the place where said court was held, and for the days when they were actually in attendance on said court. (c) That there is no authority in law for charging the defendants in this action with the number of days for which each of said witnesses has been paid, or for the mileage credited to each witness, and that said items and each of them are exorbitant, unlawful. and an improper charge against these defendants.

(2) Except and object to the items for witness fees and mileage charged for the witness A. A. Lyden, for the reason that said charges are unlawful; that said A. A. Lyden was never called as a witness; did not testify in said cause: and was not subpoenaed in the manner prescribed by section 1462 of the Compiled Laws of Alaska; that no showing was made that his testimony was material or that it was necessary or proper to subpoena him as

a witness in said cause; that he never was sworn in said cause; and no showing has been made that his testimony was of such a character as to justify his being subpoenaed as a witness, or that he knew anything about the issues involved in said cause; and that, even if he had been properly subpoenaed, he would not be entitled to the per diem or mileage set forth in said amended memorandum of costs and disbursements, or to any mileage in excess of one hundred miles each way that he would necessarily have traveled in coming to and returning from said court, and for per diem for the time it took him to travel said distance and the time he was actually in attendance on said court.

(3) Except and object to the witness fees charged for the witness B. Tunison, on the ground that the charge for per diem is excessive, as the trial of said cause only lasted four days, and he would only be entitled to six days at the outside.

(4) Except and object to the costs for the witness R. R. [397—368] Robinson, on the ground that the same are excessive, for the reason that said witness was only called for one purpose; only testified on one day; and that the charge of eight days is excessive, as he was subpoenaed at Chatanika, distance about 39 miles from Fairbanks, and could only be entitled to not to exceed four days' witness fees.

(5) Except and object to the charge for the witness Evalyn Houck, as she was only in attendance on the court at the outside for four days, the

trial of said cause lasting only four days and she being subpoenaed in the town of Fairbanks, and she would not be entitled, under any circumstances, to witness fees in excess of four days.

(6) Except and object to the witness fees of James Hagan, as said Hagan is a deputy marshal and is not entitled to witness fees in a case of this character.

(7) Except and object to the witness fees of Levi Lindgren, for the reason that said Lindgren was never called as a witness in said cause, and there is no showing that his testimony was material or that he was properly called before the court.

(8) Except and object to the charges for all the witnesses who were subpoenaed more than one hundred miles from the place of trial, and to the allowance of any witness fees to them in excess of the fees for the time they necessarily expended in traveling one hundred miles to attend court, the time actually in attendance, and the time necessarily expended in returning one hundred miles from said court, and for mileage for two hundred miles and no more.

WHEREFORE: These defendants pray: (1) That the clerk of this court disallow said amended memorandum of costs and disbursements as filed and only allow such per diem and mileage to said witnesses as are prescribed by law and no more, to wit: to the witnesses, A. H. Keller, L. A. Fairborn, Frank Doner, George Bentley, Mrs. [398—369] E. A. Williams, P. O. Wrangstedt (P. W. Ranstedt),

and W. B. Raeburn, mileage 200 miles, attendance not to exceed one day, traveling one hundred miles to attend court, one day for return, one hundred miles for attending court, for four days of the actual trial, and such additional day or days as elapsed, subsequent to said trial, before a train could be secured to return said witnesses to the place whence he or she came. (2) That the item of witness fees and mileage for the witness A. A. Lyden and for the witness Levi Lindgren be disallowed in their entirety. (3) That the witness fees and mileage of B. Tunison be reduced by one day and that he only be allowed six days' attendance and traveling time, plus his mileage. (4) That the witness fees of the witness Evalyn Houck be reduced to four days' attendance at the outside. (5) That the witness fees and mileage of the witness James Hagan be entirely eliminated. And (6) That all excessive charges as above outlined be disallowed.

Dated at Fairbanks, Alaska, on this, the thirtieth day of April, A. D. one thousand nine hundred twenty-five.

R. F. ROTH,
Attorney for Defendant T. H. Deal.
JOHN A. CLARK,
Attorney for Defendant United States Fidelity and Guaranty Company, a Corporation.

(Endorsed: "Due service hereof admitted this 30th April, 1925. Fred D. Crane, Attorney for Plaintiff."

"Filed in the District Court, Territory of Alaska, 4th Div. Apr. 30, 1925. Rob't W. Taylor, Clerk. By E. A. Tonseth, Deputy.") [399—370]

That, thereafter and on the 30th day of April, 1925, the clerk of the District Court for the Territory of Alaska, Fourth Division, by stipulation of the attorneys for plaintiff and defendants, took up the consideration of said amended memorandum of costs and disbursements, and after hearing thereon, taxed and allowed said amended memorandum of costs and disbursements in all respects as rendered.

That, thereafter and on or about the 1st day of May, 1925, defendants gave notice of their appeal to the District Court for the Territory of Alaska, Fourth Division, from said order taxing said costs, and petitioned the said District Court for the Territory of Alaska, Fourth Division, to retax said costs; said petition and notice of appeal being as follows: [400—371]

[Title of Court and Cause.]

NOTICE OF APPEAL FROM CLERK'S ORDER TAXING COSTS AND PETITION FOR RETAXATION OF COSTS BY DISTRICT COURT.

To the Clerk of the Above-entitled Court, to the Plaintiff Above Named, and to Messrs. Julien A. Hurley and Fred D. Crane, Attorneys for Plaintiff:

You and each of you will please take notice that the defendants above named do hereby appeal from

that certain decision of the clerk of the above-entitled court, made and entered on the thirtieth day of April, A. D. one thousand nine hundred twenty-five, taxing costs against the defendants above named and overruling defendants' objections to the amended memorandum of costs and disbursements on file in said matter, in the following particulars, to wit:

(1) Defendants appeal from the allowance by the clerk of this court of the per diem and mileage of the following named witnesses, as follows, to wit:

A. H. Keller:

32 days @ $4.00 per day	$128.00
940 miles at 15¢ per mile	141.00
3680 miles at 5¢ per mile	184.00

L. A. Fairborn:

8 days @ $4.00 per day	$ 32.00
244 miles at 15¢ per mile	36.60

Frank Doner:

36 days @ $4.00 per day	$144.00
940 miles at 15¢ per mile	141.00
3940 miles at 5¢ per mile	197.20

George Bentley:

34 days @ $4.00 per day	$136.00
940 miles at 15¢ per mile	141.00
5610 miles at 5¢ per mile	280.00

Mrs. E. A. Williams:

10 days @ $4.00 per day	$ 40.00
712 miles at 15¢ per mile	106.80

[401—372]

P. O. Wrangstedt (P. W. Ranstedt):

28 days at $4.00 per day	$112.00
940 miles at 15¢ per mile	141.00
4054 miles at 5¢ per mile	202.70

W. B. Raeburn:

34 days at $4.00 per day	$136.00
940 miles at 15¢ per mile	141.00
6448 miles at 5¢ per mile	322.40

for the reason that each and all of said witnesses were subpoenaed from a point more than one hundred miles distant from the place of trial of said cause and no order was ever secured from this Court directing the personal attendance of said witnesses, and no petition was ever filed requesting the Court to order the attendance of said witnesses, and said witnesses are not entitled to any greater mileage than two hundred miles, to wit, one hundred miles each way in coming to and returning from attendance upon said court, and for a per diem of not exceeding four days' attendance upon said court, and an extra two days for traveling said one hundred miles each way in coming to and returning from said court.

(2) Defendants appeal from the decision of the clerk of this court in allowing the item of witness fees and mileage to A. A. Lyden, as follows:

4 days at $4.00 per day	$16.00
224 miles at 15¢ per mile	33.60

for all the reasons last above set forth, and for the additional reason that said Lyden was not called or sworn as a witness in said cause, and no show-

ing was made to the Court that it was necessary to have him in attendance or subject to call.

(3) Defendants appeal from the allowance of eight days' attendance to R. R. Robinson, subpoenaed at Chatanika, Alaska, as said per diem is excessive and should not be for more than six days, allowing one day for traveling each way in coming to Fairbanks from Chatanika and returning to Chatanika.

(4) Defendants appeal from the allowance of five days' per diem to Evalyn Houck, as she was subpoenaed at Fairbanks, Alaska, and the trial of said cause only lasted four days, and she was only entitled to four days' compensation. [402—373]

(5) Defendants appeal from the allowance of any witness' fees or mileage to James Hagan, who is credited with five days' attendance at $4.00 a day, and 118 miles at 15¢ a mile, making a total of $37.70, for the reason that said James Hagan is a deputy United States marshal, and the Government is not compelled to pay him any witness fees whatsoever and he traveled on a Government railroad without charge.

(6) Defendants appeal from the allowance of witness' fees for two days at $4.00 a day to the witness Levi Lindgren, on the ground that said Levi Lindgren was not called as a witness and did not testify in said cause, and no showing was made that his testimony was material or that it was necessary that he be present.

(7) Defendants further petition this Court to retax said costs as follows:

A. A. Keller:
6 days' attendance at $4.00 a day $24.00
200 miles travel at 15¢ per mile 30.00

L. A. Fairborn:
6 days' attendance at $4.00 a day $24.00
200 miles' travel at 15¢ a mile 30.00

Frank Doner:
6 days' attendance at $4.00 a day $24.00
200 miles' travel at 15¢ a mile 30.00

George Bentley:
6 days' attendance at $4.00 a day $24.00
200 miles' travel at 15¢ a mile 30.00

Mrs. E. A. Williams:
6 days' attendance at $4.00 a day $24.00
200 miles' travel at 15¢ a mile 30.00

P. O. Wrangstedt (P. W. Ranstedt):
6 days' attendance at $4.00 a day $24.00
200 miles' travel at 15¢ a mile 30.00

W. B. Raeborn:
6 days' attendance at $4.00 a day $24.00
200 miles' travel at 15¢ a mile 30.00

(8) That the Court disallow any witness fees or mileage to A. A. Lyden and to Levi Lindgren.

(9) That the Court only allow the witness Evalyn Houck four days' attendance at $4.00 a day.

(10) That the Court disallow any witness fees or mileage to [403—374] the witness James Hagan.

(11) That the Court re-examine said amended

memorandum of costs and disbursements, and retax the costs in accordance with these objections and petition for retaxation;

And for such other orders as to the Court shall seem meet and just in the premises.

Dated at Fairbanks, Alaska, this 1st day of May, A. D. one thousand nine hundred twenty-five.

R. F. ROTH,
Attorney for Defendant T. H. Deal.
JOHN A. CLARK,
Attorney for Defendant United States Fidelity and Guaranty Company, a Corporation.

(Endorsed: "Due service hereof admitted this 1 May, 1925. E. B. Collins, Sp. Asst. U. S. Atty., Attorney for Plaintiff."

"Filed in the District Court, Territory of Alaska, 4th Div. May 1, 1925. Rob't W. Taylor, Clerk. By Claire Stanfield, Deputy.") [404—375]

That, thereafter and on or about the 2d day of May, 1925, said appeal and petition for retaxing said costs came on for hearing before said District Court for the Territory of Alaska, Fourth Division, and the following agreed statement of facts was submitted to said Court, to be considered in connection with said appeal from the order taxing costs and upon defendants' petition for the retaxing of said costs, to wit: [405—376]

[Title of Court and Cause.]

AGREED STIPULATION OF FACTS.

It is hereby agreed by and between the plaintiff above named, by and through its attorneys Julien A. Hurley and Fred D. Crane, and the defendants above named, by and through their attorney R. F. Roth, representing the defendant T. H. Deal, and John A. Clark, representing the defendant United States Fidelity anl Guaranty Company of Baltimore, Maryland, a corporation, that the District Court for the Territory of Alaska, Fourth Division, on considering the appeal of said defendants from the clerk's order taxing costs in said matter, may consider the following facts, which are hereby agreed upon, as true to wit:

That the plaintiff in said action, before subpoenaing the witnesses A. H. Keller, L. A. Fairborn, Frank Doner, George Bentley, Mrs. E. A. Williams, P. O. Wrangstedt (P. W. Ranstedt), A. A. Lyden, and W. B. Raeburn, all of whom were subpoenaed more than one hundred miles from Fairbanks, the place of trial, did not make any application to the above-entitled court, showing that the testimony of said witnesses was material, or that his or her oral examination was important or desirable, and the Court was not asked to, and did not, endorse on the subpoena or subpoenas for any of said witnesses an order for the attendance of said witnesses or any of them, and that each and all of said wit-

nesses were subpoenaed without making any application to the above-entitled court for any special order for their attendance, and no affidavit was made by the plaintiff, or on its behalf, showing that the testimony of said witnesses or any of them was material or that his or her oral testimony was desirable or important; [406—377] and that all of said witnesses, except A. A. Lyden, did testify for plaintiff in said action;

That A. A. Lyden was subpoenaed at Healy, Alaska, with the expectation of putting him on the stand as a witness in said cause, but said A. A. Lyden was not sworn as a witness in said cause, was not called to the stand, and did not testify therein;

That the witness Levi Lindgren was subpoenaed at Fairbanks, Alaska, with the expectation on the part of the plaintiff that he would be called as a witness, but said Lindgren was not sworn as a witness, did not testify in said cause, and was not called to the stand;

That the witness Evalyn Houck was subpoenaed at Fairbanks, Alaska, as a witness in said cause, and in response to said subpoena reported at the district attorney's office one day before the trial of said cause, and was actually in attendance during four days that said cause was on trial;

That the witness James Hagan is a deputy United States marshal, stationed at Nenana, Alaska, that he is under salary from the Government of the United States, and was not actually paid per

diem specified in said amended memorandum of costs and disbursements, and that he traveled on a pass on the Government railroad, both from and to Nenana, in attending the trial of said action;

This stipulation is made for the purpose of avoiding the necessity for introducing oral and documentary evidence as to the facts above set forth, and shall be treated as evidence in said matter and considered by the Court in determining said appeal the same as if the matters herein set forth had been presented to the Court in the form of oral or documentary evidence, and, in the event said action is appealed, may be treated as evidence introduced before said Court on the hearing on said appeal from the order taxing costs.

Dated at Fairbanks, Alaska, on this, the first day of May, A. D. one thousand nine hundred twenty-five.

JULIEN A. HURLEY,
Attorney for Plaintiff.
FRED D. CRANE,
Attorney for Plaintiff.

R. F. ROTH,
Attorney for Deft. T. H. Deal.
JOHN A. CLARK,
Attorney for Deft. U. S. F. & G. Co.

[407—378]

That thereafter said appeal was submitted to the said Court for decision and judgment, and thereafter and on the 4th day of May, 1925, the said District Court rendered oral judgment on said appeal from said order taxing costs, and sustained

defendants' objections to the following items, to wit:

"A. A. Lyden—Subpoenaed from Healy, Alaska.
4 days at $4.00 per day..... $16.00
224 miles at 1.5 per mile .....$33.60"

"Levi Lindgren—Subpoenaed from Fairbanks, Alaska.
2 days at $4.00 per day.....$ 8.00"

"Evalyn Houck—Subpoenaed from Fairbanks, Alaska.
5 days at $4.00 per day.....$20.00"

and re-taxed costs of the witness Evalyn Houck so as to read as follows:

"Evalyn Houck—Subpoenaed from Fairbanks, Alaska.
4 days at $4.00 per day.....$16.00"

That said cost bill, with the exception of the items above set forth, was taxed and allowed at a total of $3,036.85, to which said taxation and to the overruling of defendants' motion to re-tax costs as prayed for in defendants' notice of appeal, defendants then and there excepted and exception was allowed, and the defendants thereupon filed their written exceptions, as follows to wit: [408—379]

[Title of Court and Cause.]

EXCEPTIONS TO TAXATION OF COSTS.

Come now the defendants above named and except to the Court's order and judgment of date the 4th day of May, 1925, made and entered on defendants' appeal from the clerk's order taxing costs in

the above-entitled cause, in the following particulars, to wit:

(1) Except to the Court's refusal to re-tax the costs charged for the witness A. H. Keller, and to the Court's refusal to re-tax said costs on the basis of mileage for two hundred miles only, and for per diem for such days as the witness was actually in attendance on the trial of said cause, and such as would be necessary to travel one hundred miles each way coming to and returning from Fairbanks on the trial of said cause.

(2) Except to the Court's refusal to re-tax costs charged for the witness L. A. Fairborn, and to the Court's refusal to re-tax said costs on the basis of mileage for two hundred miles only, and for per diem for such days as the witness was actually in attendance on the trial of said cause, and such as would be necessary to travel one hundred miles each way coming to and returning from Fairbanks on the trial of said cause.

(3) Except to the Court's refusal to re-tax costs charged for the witness Frank Doner, and to the Court's refusal to re-tax said costs on the basis of mileage for two hundred miles only, and for per diem for such days as the witness was actually in attendance on the trial of said cause, and such as would be necessary to travel one hundred miles each way coming to and returning from Fairbanks on the trial of said cause. [409—380]

(4) Except to the Court's refusal to re-tax costs charged for the witness George Bentley, and to the

Court's refusal to re-tax said costs on the basis of mileage for two hundred miles only, and for per diem for such days as the witness was actually in attendance on the trial of said cause, and such as would be necessary to travel one hundred miles each way coming to and returning from Fairbanks on the trial of said cause.

(5) Except to the Court's refusal to re-tax the costs charged for the witness Mrs. E. A. Williams, and to the Court's refusal to re-tax said costs on the basis of mileage for two hundred miles only, and for per diem for such days as the witness was actually in attendance on the trial of said cause, and such as would be necessary to travel one hundred miles each way coming to and returning from Fairbanks on the trial of said cause.

(6) Except to the Court's refusal to re-tax the costs charged for the witness P. O. Wrangstedt, and to the Court's refusal to re-tax said costs on the basis of mileage of two hundred miles only, and for per diem for such days as the witness was actually in attendance on the trial of said cause, and such as would be necessary to travel one hundred miles each way coming to and returning from Fairbanks on the trial of said cause.

(7) Except to the Court's refusal to re-tax the costs charged for the witness W. B. Raeburn, and to the Court's refusal to re-tax said costs on the basis of mileage of two hundred miles only, and for per diem for such days as the witness was actually in attendance on the trial of said cause, and such as

would be necessary to travel one hundred miles each way coming to and returning from Fairbanks on the trial of said cause.

(8) Except and object to the Court's refusal to eliminate the fees of the witness James Hagan.

(9) Except and object to the Court's refusal to re-tax said costs in the particulas above set forth and in overruling the defendants' objections to the said taxation of costs.

Fairbanks, Alaska, 4, May, 1925.

R. F. ROTH,
Attorney for Defendant T. H. Deal.
JOHN A. CLARK,
Attorney for Defendant U. S. F. & G. Co.

[410—381]

And now, in furtherance of justice and that right may be done, the defendants in the above-entitled cause, within the time allowed by law and the orders of this court extending defendants' time within which to prepare, serve, and file their bill of exceptions in this cause, hereby present the foregoing bill of exceptions in the above-entitled cause, and pray that the same may be settled, signed, and allowed by the Judge of the above entitled court in the manner prescribed by law.

R. F. ROTH,
Attorney for Defendant T. H. Deal.
JOHN A. CLARK.
Attorney for Defendant United States Fidelity and Guaranty Company of Baltimore, Maryland, a Corporation.

[Endorsed]: Due service hereof admitted this 4 May, 1925,

JULIEN A. HURLEY,

United States Attorney and Attorney for Plaintiff.

[411—382]

[Title of Court and Cause.]

Filed May 8, 1925.

ORDER SETTLING AND ALLOWING BILL OF EXCEPTIONS.

Be it remembered that, on this 8th day of May, A. D. one thousand nine hundred twenty-five, the defendant T. H. Deal and United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, presented the foregoing bill of exceptions to the Court for settlement, which said proposed bill of exceptions was served and filed within the time allowed by law and the orders of this Court, and that, thereafter and on the 8th day of May, A. D. one thousand nine hundred twenty-five, said matter came up for hearing, and it appearing to the satisfaction of this Court, on an examination of said bill of exceptions, that it contains a full, true, and correct record of the proceedings in connection with said matters, and all material evidence, and the written exhibits introduced by the respective parties during the hearing of said cause, and the Court being fully advised in the premises, and there being no objections on the part of the plain-

tiff; now, therefore, on motion of the attorneys for the defendants.

It is ordered that the foregoing bill of exceptions be, and the same is hereby, approved and allowed and settled as the bill of exceptions in the above-entitled cause, and made a part of the record herein, and that the same has been filed and presented within the time allowed by the orders of this Court, and that the clerk of this court re-file said bill of exceptions as of this date.

Done in open court, at Fairbanks, Alaska, on this, the 8th [412—383] day of May A. D. one thousand nine hundred twenty-five.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 16, page 313. [413—384]

[Title of Court and Cause.]

Filed Mar. 3, 1925.

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

This matter coming on regularly for hearing on the application of the defendants above named for an extension of time within which to prepare, serve, and file a bill of exceptions in the above-entitled cause, and it appearing to this Court that the official court reporter, who took down the testimony in said cause, will not be able to tran-

scribe said testimony or to deliver copy thereof to the defendants until the latter part of April, A. D. one thousand nine hundred twenty-five, and that good cause exists for extending the time within which to prepare, serve and file a bill of exceptions based on the judgment this day rendered in said cause, and the Court being fully advised in the premises,—

IT IS ORDERED that the defendants be, and they are, hereby given and granted until and including the twenty-fifth day of May, A. D. one thousand nine hundred twenty-five, within which to prepare, serve and file their bill of exceptions based on the verdict of the jury, heretofore returned in said cause and the judgment of this Court this day entered thereon.

Done at Fairbanks, Alaska, on this, the third day of March, A. D. one thousand nine hundred twenty-five.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 16, page 296.
[414]

[Title of Court and Cause.]
Filed May 4, 1925.

ASSIGNMENT OF ERRORS.

Come now the defendants in the above-entitled cause, being the plaintiffs in error, and assign the following errors as having been committed by

the above-named court on the trial of the above-entitled cause, which error was excepted to by the defendants, and exception allowed, and which error the said defendants intend to, and do, rely upon on defendants' writ of error, to be prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit.

PLEADINGS AND PROCEDURE.

(1) The Court erred in overruling defendants' motion to require plaintiff to make its second amended complaint more definite and certain, by alleging definitely what alleged acts of negligence were relied upon by plaintiff as occasioning the loss alleged to have been suffered by plaintiff.

(2) The Court erred in overruling the separate demurrers of the defendants to plaintiff's second amended complaint.

(3) The Court erred in overruling the defendants' motion for a nonsuit at the conclusion of plaintiff's case.

(4) The Court erred in overruling defendants' motion for a nonsuit after the close of all the evidence and before the matter was submitted to the jury. [415]

(5) The Court erred in refusing to direct the jury to bring in a verdict in favor of the defendants on defendants' motion after the close plaintiff's case and the conclusion of plaintiff's opening argument.

(6) The Court erred in overruling the defendants' motion for a new trial and in refusing to grant a new trial.

(7) The Court erred in entering any judgment in favor of the plaintiff on the verdict rendered in said cause.

(8) The Court erred in admitting any evidence on behalf of plaintiff over the objection of defendants on the ground that plaintiff's second amended complaint failed to set forth a cause of action in favor of plaintiff and against defendants or either of them.

(9) The Court erred in refusing to dismiss said action on defendants' motion on the ground that plaintiff's second amended complaint failed to set forth any cause of action in favor of plaintiff and against defendants.

EXCEPTIONS TO INSTRUCTIONS REFUSED.

(10) The Court erred in refusing to instruct the jury and in overruling defendants' motion to give to the jury the proposed instruction as follows:

> "The Court instructs the jury that, if you find the defendant T. H. Deal was guilty of negligence, this would not entitle the plaintiff to recover, unless such negligence was the cause of plaintiff's loss, if it suffered loss."

(11) The Court erred in refusing to instruct the jury and in overruling defendants' motion to give to the jury the proposed instruction as follows:

> "The Court instructs the jury that you cannot allow the plaintiff anything for loss suffered, unless you believe from the evidence that the loss was caused by the negligence of the defendant T. H. Deal.

(12) The Court erred in refusing to instruct the jury and in overruling defendants' motion to give to the jury the [416] proposed instruction as follows:

"The Court instructs the jury that the plaintiff cannot recover from the defendants, unless you believe from the evidence that the loss suffered by the plaintiff was by reason of the negligence of the defendant T. H. Deal, in the manner alleged in the complaint. If the loss was suffered in any other manner or from any other cause than those set forth in the complaint, the plaintiff cannot recover."

(13) The Court erred in refusing to instruct the jury and in overruling defendants' motion to give to the jury the proposed instruction as follows:

"You are instructed that the burden of proving negligence rests on the party alleging it, and where a person charges negligence on the part of another as a cause of action, he must prove the negligence by a preponderance of evidence. And in this case, if the jury find that the weight of the evidence is in favor of the defendants or that it is equally balanced, then the plaintiff cannot recover and the jury should find the issues for the defendants."

(14) The Court erred in refusing to instruct the jury and in overruling defendants' motion to give to the jury the proposed instruction as follows:

"The jury are instructed that they have no right to guess or conjecture that the loss complained of by the plaintiff is the result of

negligence on the part of the defendant T. H. Deal. Whether it is or not must be determined by the jury from the evidence. The jury is not to understand from this or any other instruction that the Court intends to intimate any opinion upon that or any other question of fact in this case. All such questions and matters are solely and exclusively for the jury, and they must determine them from the evidence, and from that alone."

(15) The Court erred in refusing to instruct the jury and in overruling defendants' motion to give to the jury the proposed instruction as follows:

"You are further instructed that the money alleged to have been lost from the registered package described in plaintiff's complaint was not deposited with the postmaster as Government money, and even if you should find, by a preponderance of the evidence, that said money was lost and that it was Government money of the United States, you are instructed that said postmaster was only required to give to said registered package the same care and attention required by law and the United States post-office regulations pertaining to any registered mail matter; and you are further instructed that neither he nor his bondsman would be liable therefor, even though you should find, by a preponderance of the evidence, that the said loss occurred while the package was still in the possession of the said United States postmaster at Fairbanks, Alaska,

unless you should [417] also find, by a preponderance of the evidence, that said loss was occasioned by the negligence of T. H. Deal, or by reason of the disregard of or violation by the postmaster of some law or regulation in regard to the handling of registered mail, described in plaintiff's complaint."

(16) The Court erred in refusing to instruct the jury and in overruling defendants' motion to give to the jury the proposed instruction as follows:

"The jury are further instructed that the plaintiff contends that the loss described in plaintiff's complaint was occasioned by reason of the carelessness and negligence of the Fairbank's postmaster T. H. Deal, and by reason of his violations of the rules and regulations prescribed by the United States Postoffice Department, and you are instructed that the plaintiff is confined by its pleadings to the negligence of the postmaster, as set forth in the complaint, and if you are satisfied, from a preponderance of the evidence, that the registered package described in plaintiff's complaint was rifled while still in the Fairbanks postoffice, but that said loss was occasioned by the carelessness, negligence, or disregard of the law or regulations relative to registered packages by a regularly appointed employee of the Fairbanks postoffice, regularly sworn as such postal employee and holding office by and with the concurrence of the Postmaster General, then you are instructed that, under the said

pleadings, you cannot find in favor of the plaintiff, but your verdict must be for the defendants, unless you are also satisfied, by a preponderance of the evidence, that said dfendant poderance of the evidence, that said defendant T. H. Deal was negligent in employing incompetent help, or in improperly supervising said employees."

(17) The Court erred in refusing to instruct the jury and in overruling defendants' motion to give to the jury the proposed instruction as follows:

"You are further instructed that, in this case, the general laws of the United States, regulations of the Postoffice Department, and conditions of the bond sued upon, dealing with the duties of the postmaster as a fiscal agent of the Government or as regards the postal savings system, are not applicable and could not be considered by you in arriving at a verdict in this case, as the duties of a postmaster in regard to registered mail are governed by separate and distinct laws and regulations from those fixing and defining his duties in the handling of Government funds and postal savings."

(18) The Court erred in refusing to instruct the jury and in overruling defendants' motion to give to the jury the proposed instruction as follows:

"You are instructed that there was not in existence on the 15th and 16th days of September, 1921, any regulation of the United States Postoffice Department requiring registered

packages to be kept in a safe, and that the regulations [418] then existent provided that the registered matter be kept separate from ordinary mail matter and properly protected from accident or theft, and unless you are satisfied by a preponderance of the evidence that this regulation was violated by the postmaster at Fairbanks at that time, and that said violation was the cause of the depredation upon said registered package described in plaintiff's complaint, and that said depredation upon said registered package took place in the United States postoffice at Fairbanks, Alaska, then your verdict must be for the defendants."

(19) The Court erred in refusing to instruct the jury and in overruling defendants' motion to give to the jury the proposed instruction as follows:

"You are instructed that, before you can find a verdict in favor of the plaintiff in this action, you must be satisfied, from a preponderance of the evidence, of the following facts, to wit: (1) That a part of the contents of the registered package in question was abstracted before it was delivered to the person to whom it was addressed; (2) That said money was abstracted from said package while it was in the possession of, or under the direct control of, T. H. Deal as postmaster at Fairbanks, Alaska, and before it passed out of his possession; (3) That said loss was caused by reason of the violation by said T. H. Deal as

postmaster of some general law of the United States applicable to registered mail, or of a regulation of the Postoffice Department, pleaded in plaintiff's complaint; and unless you are satisfied, by a preponderance of the evidence, of the existence of the conditions above set forth, then your verdict must be for the defendants."

(20) The Court erred in refusing to instruct the jury and in overruling defendants' motion to give to the jury the proposed instruction as follows:

"You are instructed that a postmaster of a United States postoffice is subject to the general laws of the United States applicable to postmasters, to the regulations duly promulgated by the Postoffice Department and communicated to said postmaster, and his bondsman are liable for any loss or damage suffered by reason of the postmaster's violation of the law, or disregard of the regulations, provided such violation of the law or regulations is the cause of said loss."

(21) The Court erred in refusing to instruct the jury and in overruling defendants' motion to give to the jury the proposed instruction as follows:

"You are instructed that the United States postoffice regulations in force at the date of the alleged rifling of the registered package referred to in plaintiff's complaint provided that all registered matter should be kept separate from ordinary matter and properly protected from accident or theft (Sec. 885, P. R. 1913),

and unless you are satisfied, from a preponderance of the evidence, that said registered package [419] referred to in plaintiff's complaint was not kept separate from the ordinary mail matter and properly protected from accident and theft, and that it was taken from the possession of the postmaster at Fairbanks without any fault or negligence on the part of said postmaster, then your verdict should be for the defendants."

(22) The Court erred in refusing to instruct the jury and in overruling defendants' motion to give to the jury the proposed instruction as follows:

"You are further instructed that a postmaster is not insurer of registered mail, and that, if he handles said registered mail in the manner prescribed by law and the regulations of the Postoffice Department, then he is not liable for loss or depredation upon said registered mail while it is in his possession."

EXCEPTIONS TO INSTRUCTIONS GIVEN.

(23) The Court erred in giving to the jury its instruction No. 14, which was as follows:

"The Court instructs the jury that during the period from the 14th day of September, 1921, to and including the 16th day of September, 1921, the Alaska Engineering Commission was an organization or Board created by act of Congress of the United States and maintained by appropriations from the United States Treasury of public moneys of the United States for the purpose of constructing and operating what

is now known as the Alaska Railroad, in the territory of Alaska; and if you find and believe from a preponderance of the evidence in this case that the Alaska Engineering Commission, by and through its Disbursing Agent at Healy, Alaska, requested, by letter, the First National Bank of Fairbanks, Alaska, to transmit to them at Healy, Alaska, via Nenana, Alaska, by registered mail, the sum of $9937.65 in United States currency and silver money in exchange for checks held and owned by the Alaska Engineering Commission, of the aggregate value of $9937.65; and if you further find and believe from a preponderance of the whole evidence that on the 15th day of September, 1921, the said First National Bank of Fairbanks, at Fairbanks, Alaska, pursuant to said request from said Alaska Engineering Commission, placed in a coin sack or canvas bag the said sum of $9937.65 in currency and silver, and sealed the said sack or bag and delivered the same in the usual and regular order of business to the proper official of the United States postoffice at Fairbanks authorized to receive the same for the purpose of registering the said package according to the ordinary custom, laws and regulations of the United States Postoffice Department, and that the said bag or package, and the contents as aforesaid, were so duly registered for transmission to the United States postoffice at Nenana, Alaska, and properly ad-

dressed to the Alaska Engineering Commission at Healy, Alaska, via Nenana, then I instruct you that when said bag and contents were so delivered, and registered as aforesaid, into the custody of the United States postmaster at the [420] United States postoffice at Fairbanks, Alaska, the same were then and thereafter the property of the United States of America, the plaintiff herein, and the said First National Bank of Fairbanks, Alaska, had no right, title of interest therein or thereto."

(24) The Court erred in giving to the jury its instruction No. 15, which was as follows:

"You are instructed that the United States postal laws and regulations, and all amendments and supplements thereto, promulgated, pursuant to authority granted by act of Congress, by the Postmaster-General of the United States, have the effect and force of law and are binding upon all postmasters appointed by and under the authority of the President of the United States, and the legal duty devolves upon any postmaster to observe the same, and to require their observance by all his employees who are not themselves under bond, and the failure of any postmaster, which produces a loss, so to do with reference to the receiving, caring for, and guarding of registered mail matter, and manner of handling and despatching, renders such postmaster liable upon his official bond to any person injured or damaged, and to the extent of such injury or damage

where such loss occurs to such registered package, or contents thereof, while it is in his custody, control, and possession, and in such case it is not necessary for the person injured to show that the postmaster was guilty of any negligence other than the neglect of his official duty as imposed upon him by the said postal laws and regulations, and amendments and supplements thereto; and you are further instructed that the phrase or term 'Postal Laws or Regulations,' or 'United States Postal Laws and Regulations' or 'Laws and Regulations of the United States Postoffice Department,' wherever the same, or either thereof, are or is mentioned in these instructions, is intended to mean and to include all amendments and supplements thereto promulgated by the Postmaster-General and in force and effect on and prior to the 16th day of September, 1921."

(24½) The Court erred in giving to the jury its instruction No. 16, which was as follows:

"You are instructed that the plaintiff in this case claims that the depredation upon and loss from the registered package in controversy was caused by the negligence [421] of the defendant Deal and by his disregard of the postal laws and regulations governing the handling of registered packages; and in this connection you are instructed that the word 'negligence' as herein used means the neglect of his official duty as such postmaster as those

duties are defined by the United States postal laws and regulations."

(25) The Court erred in giving to the jury its instruction No. 17, which was as follows:

"You are instructed that it is claimed by the plaintiff in this case that the defendant Deal knew that the registered package in controversy contained money belonging to the plaintiff herein, or that all the circumstances as disclosed by all the evidence in the case were sufficient to charge him with knowledge that said registered package in controversy contained money, the property of the plaintiff herein; and if you find and believe from a preponderance of the evidence in this case that, when the said registered package was received into the United States postoffice at Fairbanks, Alaska, it was so received from the First National Bank of Fairbanks, Alaska, addressed to Frank T. Doner, Special Disbursing Agent of the Alaska Engineering Commission, at Healy, Alaska, via Nenana, Alaska, and that such package was an ordinary canvas or cloth sack, sealed at the top and heavy at one end, and that the person receiving it at the postoffice for registry had reason to believe, and did believe, that it contained money, taking all the circumstances as disclosed by the evidence into consideration, and that the defendant Deal was present and assisting in despatching the said package when contained in a paper jacket ordinarily used for enclosing registered packages, then I instruct

you as a matter of law that the belief of the employee who received the said package into the postoffice as to the contents thereof is imputed by the law to the defendant Deal himself, and you, as jurors, would be warranted in assuming and believing that, under all the circumstances of the case, he also believed the said registered package to contain money, and that said money was the property of plaintiff herein."

(26) The Court erred in giving to the jury its instruction No. 19, which was as follows:

"You are instructed that one of the conditions and obligations imposed upon the defendant Deal by his acceptance of the office of postmaster of the United States postoffice at Fairbanks under the terms and conditions of the bond, which it is admitted he executed as principal and the defendant United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, executed as surety, is to the effect that the defendant Deal shall faithfully discharge all duties and trusts imposed upon him as postmaster, either by law or by the regulations of the Postoffice Department; and if you find and believe from a fair preponderance of the evidence in this case that the duties and trusts imposed upon the defendant Deal as postmaster, either by law or by the regulations of the Postoffice Department, required that, as such postmaster, before he should ship any registered package out of his office and on its

way to its destination that he should enclose the same [422] in a sealed jacket, and that, with reference to the registered package in controversy in this action, he failed to do so, and that the said package, while in his care and custody, was rifled, and any money, the property of the United States, removed therefrom, then and in that event the defendant Deal and the surety upon his official bond would be responsible for the loss occasioned would be removal, and in that event you should find a verdict for the plaintiff for an amount equal to the amount of money which you find to have been removed from said registered package."

(27) The Court erred in giving to the jury its instruction No. 21, which was as follows:

"You are further instructed that, if you find and believe, from a preponderance of the evidence, that the registered package in controversy in this action was not placed in a sealed jacket and the contents thereof witnessed, as required by the postal laws and regulations, by the defendant Deal personally, but that the same was done by the stamp clerk, who had been employed by the said Deal as postmaster, only a month before, and that she had not theretofor received any instructions from the said defendant Deal as postmaster, or from anybody in his behalf and under his supervision, with reference to the rules laid down by the United States postal laws and regulations concerning the handling, caring for, guarding and despatch-

ing of registered packages, and that the defendant Deal failed in his duty in supervising the method employed by the said stamp clerk in so handling, caring for, guarding and despatching said registered package in controversy, then I instruct you that the violation and disregard of the United States postal laws and regulations by the said stamp clerk is by the law imputed to the defendant Deal personally; and if you further find from a preponderance of the evidence that a loss occurred to the plaintiff in the sum of $9,900.00, and that said loss occurred in the United States postoffice at Fairbanks, Alaska, and not elsewhere, under the abovementioned conditions, you should find a verdict for the plaintiff; otherwise your verdict should be for the defendants."

(28) The Court erred in giving to the jury its instruction No. 22, which was as follows:

"You are instructed that the official oath of the defendant Deal as postmaster, among other things, contains the following provision: 'And that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control: So help me God.' In this connection you are instructed that, if you find and believe from a preponderance of all the evidence in the case, that the defendant Deal knew that the registered package in controversy contained money, and that said money was the property of the United States, and

that the said registered package was looted and rifled of $9,900.00 in currency while it was in his care and custody and control in the United States postoffice at Fairbanks, and that, when the said registered package was despatched from the said postoffice, it had the bottom thereof torn open and fastened temporarily with an eight-penny or a ten-penny finishing nail, and the sum of $9,900.00 which it formerly [423] contained had been abstracted and removed therefrom, and it then contained only $37.65 of the money which it had contained at the time it was delivered into the postoffice by the First National Bank, if you find from a preponderance of the evidence it was so delivered, and that, at the time the said registered package left the said postoffice in the registry pouch it contained only $37.65 in silver, and a copy of the Popular Mechanics magazine, and a finishing nail holding the cut portions of the sack together, and that thereby the plaintiff herein sustained a loss of $9,900.00, and that the plaintiff has demanded from the defendants, and each of them, the payment of said sum of $9,900.00, and that they, and each of them, have refused to pay the same, then I instruct you that you should return a verdict for the plaintiff; otherwise your verdict should be for the defendants."

(29) The Court erred in giving to the jury its instruction No. 23, which was as follows:

"You are instructed that the United States

postoffice regulations in force at the date of the alleged rifling of the registered package referred to in plaintiff's complaint provided that all registered matter should be kept separate from ordinary matter and properly protected from accident or theft, and if you are satisfied from a preponderance of the evidence that said registered package referred to in plaintiff's complaint was kept separate from the ordinary mail matter and properly protected from accident and theft, and that it was taken from the possession of the postmaster at Fairbanks without any negligence, or disregard of the postal laws and regulations on the part of said postmaster, then your verdict should be for the defendants. In your consideration you are to be the judges, from all the evidence in the case, whether said registered package and contents were or were not kept separate from ordinary mail matter, and whether or not they were properly protected from accident or theft, in view of this regulation of the Postoffice Department governing the conduct of postmasters with reference to registered mail matter; and unless you find that they were not so kept separate and were not so properly protected from accident or theft, you cannot find a verdict for the plaintiff, but should return your verdict in favor of the defendants."

(30) The Court erred in giving to the jury its instruction No. 24, which was as follows:

"You are instructed that if you find and be-

lieve from a preponderance of the evidence in the case that a loss of $9,900.00 occurred to the plaintiff herein in the postoffice at Fairbanks, Alaska, and that the defendant Deal failed to fully lock the safe in which was contained the registered package in controversy during the night of September 15, 1921, and morning of September 16, 1921, and that he did not use the full combination thereof for the purpose of locking it at said time, you should return a verdict for the plaintiff; otherwise your verdict should be for defendants."

(31) The Court erred in giving to the jury its instruction No. 26, which was as follows: [424]

"You are instructed that if you find and believe from a preponderance of the evidence that a loss of $9,900.00 occurred to the plaintiff in the United States postoffice at Fairbanks, Alaska; and if you further find that at any time during the period that he was postmaster in said postoffice and prior to the 16th day of September, 1921, the defendant Deal failed to change the combination on the safe in which the registered package in controversy was stored during the night of September 15, 1921, and the morning of September 16, 1921, until it was despatched from the said postoffice, then you should find a verdict for the plaintiff; otherwise your verdict should be for the defendants."

(32) The Court erred in giving to the jury its instruction No. 27, which was as follows:

"You are instructed that if you find and be-

lieve from a preponderance of the evidence in this case that a loss occurred to the plaintiff herein in the United States postoffice at Fairbanks, Alaska, either on the night of September 15, 1921, or in the morning of September 16, 1921, from the registered package in controversy in this action, and that during said time, or any part of said time, the defendant Deal permitted unauthorized persons to have access to the work-room of the postoffice where said registered package was then kept or stored, you should return a verdict for the plaintiff herein, otherwise your verdict should be for the defendants.'

EXCEPTIONS TO COURT'S RULINGS ON ADMISSION AND REJECTION OF EVIDENCE. [425]

(33) The Court erred in permitting the witness Frank T. Doner, over defendants' objections, to testify as follows:

"Q. Mr. Doner, I will ask you if, on or about the 13th or 14th or 15th of September 1921, you ordered some money to be shipped to you from the bank at Fairbanks, and if so, how much? (Defendants object, irrelevant, incompetent and immaterial, not binding upon defendants. Objection overruled. Exception.)

A. Why, I ordered at that time $9,937.65, through the First National Bank."

(34) The Court erred in permitting the witness Frank T. Doner, over defendants' objections, to testify as follows:

"Q. Mr. Doner, in your position as Disbursing Agent of the Alaska Engineering Commission at Healy, Alaska, did you have any moneys of the Government of the United States under your control? (Defendants object, irrelevant, incompetent and immaterial. Objection overruled. Exception.)

A. I did."

(35) The Court erred in permitting the witness Frank T. Doner, over defendants' objections, to testify as follows:

"Q. Mr. Doner, was it your practise at Healy, Alaska, to cash checks and time-checks for employees of the Alaska Engineering Commission? (Defendants object, irrelevant, incompetent, and immaterial, not binding on defendants. Objection overruled. Exception.)

A. Yes, sir."

(36) The Court erred in permitting the witness Farnk T. Doner, over defendants' objections, to testify as follows:

"Q. I will ask you if, about the 14th or 13th or 14th day of September, you sent some checks, and if so, to what amount, to the First National Bank at Fairbanks, Alaska? (Defendants object, irrelevant, incompetent, and immaterial, not binding on defendants or either of them. Objection overruled. Exception.)

A. I sent $9,937.65 in checks to the First National Bank to exchange for currency."

(37) The Court erred in permitting the witness

Frank T. Doner, over defendants' objections, to testify as follows:

"Q. Now those checks that you sent, state who they belonged to. (Defendants object, irrelevant, incompetent, and immaterial, not binding on defendants. Objection overruled. Exception.)

A. Belonged to the United States Government."

(38) The Court erred in permitting the witness Frank T. Doner, over defendants' objections, to testify as follows: [426]

"Q. And how did the United States Government come into possession of those checks? (Defendants object, irrelevant, incompetent, and immaterial, does not tend to prove any of the issues in the case, not binding on defendants. Objection overruled. Exception.)

A. Why, I cashed them from my cash fund, the fund that belonged to the United States Government."

(39) The Court erred in permitting the witness Frank T. Doner, over defendants' objections, to testify as follows:

"Q. And do you know, of your own knowledge, who sustained the loss of $9,900.00? (Defendants object, irrelevant, incompetent, and immaterial. Objection overruled. Exception.)

A. The United States Government."

(40) The Court erred in permitting the witness Frank T. Doner, over defendants' objections, to testify as follows:

"Q. I will ask you one other question, Mr. Doner; was it your custom at that time to ship your payrolls by registered mail? (Defendants object, irrelevant, incompetent and immaterial. Objection overruled. Exception.)

A. Yes, that has been our method."

(41) The Court erred in permitting the witness Frank T. Doner, over defendants' objections, to testify as follows:

"Q. About how many shipments have you made, up to this time, through the postoffice at Fairbanks, Alaska, to Healy, if you know, by registered mail? (Defendants object, irrelevant, incompetent, and immaterial, no foundation laid, not binding on Deal as postmaster as it is not shown that the matter was brought to the knowledge of Mr. Deal. Objection overruled. Exception.)

A. Well, I have no idea as to the amount, but we used to cash a large percentage of our checks there, there being no bank, and as soon as I got an accumulation I sent them right up to the bank here, in exchange for currency; I would do that frequently."

(42) The Court erred in permitting the witness Geo. Hutchinson, over defendants' objections, to testify as follows:

"Q. Do you now recall receiving a message or letter from the disbursing officer of the Alaska Engineering Commission regarding a shipment of some money?

A. Yes, I have the letter here.

Q. Just state what was received. (Defendants object, irrelevant, incompetent, and immaterial. Objection overruled. Exception.)

A. (Reading:) 'September 10th, 1921. The First National Bank, Fairbanks. Gentlemen: Enclosed checks to the amount of $9,937.65, for which please send currency as follows: $5,000.00 in 20's; $3,000 in 10's; $1,900 in 5's; and balance in quarters"—that means silver."

(43) The Court erred in permitting the witness Evalyn Houck to testify and in refusing to strike the answer of said witness, [427] over defendants' objections, as follows:

"Q. Miss Houck, did you have any knowledge of what that parcel contained?

A. Well, I though it was money; I was not sure.

Mr. CLARK.—We ask that that be stricken, if the Court please, as mere surmise.

Mr. ROTH.—It was not responsive to the question.

(Objection overruled. Exception.)"

(44) The Court erred in refusing to permit the witness A. H. Keller to answer questions propounded to him by the defendants, as follows:

"Q. Mr. Keller, I understood you to say that you were freight clerk.

A. Yes, sir.

Q. As such did you understand that you were authorized to handle mail?

Mr. CRANE.—Object to that as incompetent,

irrelevant, and immaterial, not proper cross-examination; further, it does not tend to prove or disprove any of the issues in this case, and not proper cross-examination.

The COURT.—Objection sustained.

Mr. ROTH.—We except.

The COURT.—Exception allowed."

Q. You were a sworn officer at that time?

Mr. CRANE.—Same objection, if the Court please.

The COURT.—Same ruling.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

(45) The Court erred in permitting the witness Whitney W. Clarke, over defendants' objections, to testify as follows:

"Q. I will ask you, Mr. Clarke, if, while you were employed in the postoffice, and prior to the 15th day of September 1921, if it was customary in the postoffice to use the day combination on the small safe when closing it at night. (Defendants object as incompetent, irrelevant, and immaterial; it was not alleged in the complaint as an act of negligence; not specifically mentioned as an act of alleged negligence; is a variation, and plaintiff is attempting to vary the terms of the complaint. Objection overruled. Exception.)

A. It was."

(46) The Court erred in permitting the witness Whitney W. Clarke, over defendants' objections, to testify as follows:

"Q. I will ask you if, while you were employed in the postoffice and prior to the robbery of September 15th, 1921, if the combination on the small iron safe was changed, to your knowledge. (Defendants object, irrelevant, incompetent, and immaterial, no foundation laid, for all the reasons last above set forth. Objection overruled. Exception.

A. Not to my recollection. [428]

(47) The Court erred in sustaining plaintiff's objection to a question asked by defendants of the witness E. A. Hering, as follows:

"Q. What did you consider your status as regards the postoffice, subsequent to the time when you ceased to draw salary but prior to the time when you ceased to help Miss Smith?

Mr. CRANE.—We object to that, if the Court please, as improper cross-examination, incompetent, irrelevant, and immaterial, not tending to prove or disprove any issue in this case, and calling for a conclusion of the witness.

The COURT.—Objection sustained.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed."

(48) The Court erred in permitting the witness James Hagan over defendants' objections, to testify as follows:

"Q. If there had been anything unusual you would have seen it, would you? (Defendants

object, improper redirect examination. Objection overruled. Exception.)

A. If there had been anything unusual I would have seen it, I think; especially around the mail."

(49) The Court erred in overruling defendants' motion to strike out an answer given by the witness D. Tunison as follows:

"Q. I hand you Plaintiff's Exhibit 'G' for Identification and ask you if this is a similar magazine to the one that was found in that sack that night.

A. It is. The magazine had no cover on it. Of course I didn't pay particular attention about what date or issue it was.

Q. Just show me how that magazine was folded.

A. (Illustrating.) About like that.

Q. How was it wrapped?

A. Brown paper, tied with postoffice string.

Mr. CLARK.—We ask that last part be stricken out as a conclusion. If they have a string they can introduce it in evidence. He is testifying now, giving a conclusion as to what it was tied with.

The COURT.—Objection overruled.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed."

(50) The Court erred in permitting the witness W. B. Raeburn, over defendants' objections, to testify as follows:

"Q. Had you been in the habit of receiving packages containing currency shipped from the First National Bank at Fairbanks by resgistered mail to Frank Doner, disbursing agent of the Alaska Engineering Commission, at Healy, Alaska? (Defendants object, irrelevant, incompetent, immaterial, not tending to prove any fact or issue in the case, not relevant to any material allegation [429] in the complaint. Objection overruled Exception.)

A. Yes, sir."

(51) The Court erred in permitting the witness G. Wetzler, over defendants' objections, to testify as follows:

"Q. Mr. Wetzler, state whether or not you found a large stack of magazines in the postoffice in Fairbanks, Alaska. (Defendants object, immaterial, incompetent, irrelevant, no bearing on any of the issues in the case. Objection overruled. Exception.)

A. Yes, sir."

(52) The Court erred in permitting the witness G. Wetzler, over defendants' objections, to testify as follows:

"Q. Now I will ask you if, immediately after you finished your investigation in the postoffice at Fairbanks, Alaska, if you made an inquiry and investigation on the train between Fairbanks and Nenana, and around the Alask Engineering Commission buildings, warehouses, at Nenana, to ascertan whether or not there were

—and in the postoffice at Nenana, Alaska,—to see if you could find any similar finishing nails to the one in the sack. (Defendants object, as calling for a conclusion of the witness, not incumbent on the witness to tell what he did and for the jury to decide whether or not he made an investigation. Objection overruled. Exception.

A. I made an investigation at the Nenana office, in the Nenana, office, and inquired—an investigation at Mr. Raeburn's office."

(53) The Court erred in sustaining plaintiff's objection to certain questions asked by the defendants of the witness G. Wetzler, on cross-examination, as follows:

"Q. Is there any regulation of the postoffice department requiring registered matter to be kept in a safe? A. There is, yes, sir.

Q. Will you point it out to me in the book of regulations?

Mr. CRANE.—Object to that, if the Court please, as improper cross-examination of this witness.

The COURT.—Objection sustained.

Mr. CLARK.—Does the Court sustain the objection?

The COURT.—Yes, sir.

Mr. CLARK.—He has already answered that there is a regulation.

The COURT.—I sustained the objection as immaterial.

Mr. ROTH.—We except, if the Court please.

The COURT.—Exception allowed."

(54) The Court erred in sustaining plaintiff's objection to a certain question asked of the post-office inspector G. Wetzler, as follows:

"Q. And you considered it a perfectly safe method of carrying mail, did you, to have it put in a freight car, [430] without freight clerks, without anyone to guard it, in a car from which freight is taken out at every station along the road?

Mr. CRANE.—We object to that, if the Court please, as incompetent, improper cross-examination, and calling for the conclusion and the opinion of the witness,

Mr. CLARK.—Now, if the Court please, he said that it was upon his recommendation, and it was brough out on direct examination, and I think it is perfectly competent to show the reasons of recommending this particular system.

The COURT.—Objection sustained.

Mr. CLARK.—We note an exception.

The COURT.—Exception allowed."

(55) The Court erred in permitting the witness G. Wetzler, over defendants' objections, to testify as follows:

"Q. Mr. Wetzler, during the time the mail was handled in this way that you explained to Mr. Clark, on cross-examination, were there any mails sacks, or any registered parcels, or

any letters lost, or any robberies, or anything stolen? (Defendants object, irrelevant, incompetent, immaterial.)

A. No, sir."

(56) The Court erred in permitting the witness G. Wetzler, over defendants' objections, to testify as follows:

"Q. Mr. Wetzler, in your investigation of this case, did you ascertain as to whether or not large shipments of currency, by registered mail, had been shipped from the First National Bank at Fairbanks, Alaska, to the disbursing agent at Healy, Alaska, of the Alaska Engineering Commission? (Defendants object, not cross-examination, irrelevant, incompetent, immaterial. Objection overruled. Exception.)

A. The package that was lost,—pilfered,—was the 23d package shipped from the First National Bank to Frank Doner at Nenana,"

(57) The Court erred in permitting the witness J. E. Fitzgerald, over defendants' objections, to testify as follows:

"Q. Did you, at that time, make a search in the postoffice for finishing nails similar to the one that Mr. Wetzler turned over to you? (Defendants object, irrelevant, incompetent, immaterial, no foundation laid, not shown that the postoffice was in the same condition as on the 16th of September, and calling for conclusion of the witness. Objection overruled. Exception.)

A. I made a search, yes, sir.

Q. What did you find?

A. I found several finishing nails, the same kind as the one that was stuck in the sack."

(58) The Court erred in sustaining plaintiff's objection to a certain question asked by defendants of the witness J. E. Fitzgerald, [431] on cross-examination, as follows:

"Q. But supposing that the postmaster should find that the Government hadn't furnished proper receptacles for registered mail, and he should go out and procure a proper receptacle, and do it personally, do I understand you to say that his act in doing that would put that receptacle in the possession of the Government of the United States?

Mr. CRANE.—Just a minute, Mr. Fitzgerald. We object to that as improper cross-examination; also stating a state of facts that do not exist, or assuming to state a state of facts that do not exist.

The COURT.—Objection sustained.

Mr. ROTH.—We except to the ruling of the Court.

The COURT.—Exception allowed."

(59) The Court erred in permitting the witness T. L. Neil, over defendants' objections, to testify as follows:

"Q. Mr. Neil, I will ask you, referring to the postal laws and regulations that you have there, I will ask you to read what the regula-

tion is regarding the changing of combinations on safes, and further, in regard to leaving the safe on day combination, and by what regulation is that covered?

A. This is section 36*i* of the Postal Laws and Regulations of 1913. I might say that this edition of the Postal Laws and Regulations *were* published in 1913; since that time we have had a new edition in 1924. Section 361 relates to the care of public funds and property; safes to be completely locked; combinations of safes to be changed; and a penalty for failure, or rather, to make such changes.

Mr. CLARK.—We object to that last statement of Mr. Neil's because there is no provision there for penalty at all, and we ask that part be stricken.

The COURT.—That may be stricken.

The WITNESS.—I will correct that, yes.

Q. You may read it.

A. Section 361 of the 1913 Postal Laws and Regulations—

Mr. CLARK.—Just one moment, before you read that, if the Court please. We object to this testimony for the reason that the complaint does not specify the particular acts of negligence, alleged negligence, relied upon by the Government; that it does not specify specifically what particular violation or breach of duty was relied upon by the Government as the basis for this action, and that this section is

irrelevant, incompetent, and immaterial for that reason.

Mr. ROTH.—And on further ground, if the Court please, that the complaint in this case, the second amended complaint, does not set forth specifically what of the many provisions of section 361 constitutes the claimed act of negligence.

The COURT.—The objection will be overruled.

Mr. ROTH.—Exception.

Q. Go ahead and read it.

A. (Here witness reads section 361 of the Postal Laws and Regulations of 1913.) [432]

(60) The Court erred in permitting the witness T. H. Neil over defendants' objections, to read in evidence section 524 of the Postal Laws and Regulations of 1913, and in permitting the witness, over defendants' objections, to testify as follows:

"Q. I will ask you, Mr. Neil, if you have with you the regulation regarding the permitting of unauthorized persons in the work-room of the postoffice,—have you that regulation?

Mr. CLARK.—We object, if the Court please, unless it is confined to one of the postal regulations which they have pleaded here as having been violated. Under the Court's ruling, they will undoubtedly introduce the four different regulations that they have pleaded, but we object to any evidence concerning any others except those four that are pleaded.

The COURT.—Objection overruled.

Mr. CLARK.—We note an exception.

The COURT.—Exception allowed.

A. (Here witness reads section 524 of the Postal Laws and Regulations of 1913.)"

(61) The Court erred in permitting the witness T. H. Neil, over defendants' objections, to read section 1015 of the 1913 Postal Laws and Regulations, and in overruling defendants' objections to the introduction thereof, as follows:

"Q. Mr. Neil, have you the regulation there regarding the sealing of jackets?

A. Yes, I have.

Q. Or regarding the Alaska registered jacket service,—what is the number of that?

A. 1015.

Q. Will you read it?

A. Section 1015 of the 1913 Postal Laws and Regulations is as follows:—

Mr. ROTH.—(Interrupting.) We object to that on the ground the same is irrelevant, incompetent and immaterial; that it is not a section that conforms to the proof that has been offered with reference to the amount of registered packages; that it is not alleged in the complaint; that is, there is no specific act alleged in the complaint that would warrant the introduction of the particular regulation in question.

The COURT.—Objection overruled.

Mr. ROTH.—Exception.

The COURT.—Exception allowed.

Q. Go ahead and read it, Mr. Neil.

A. (Here witness reads section 1015 of the 1913 Postal Laws and Regulations.)"

(62) The Court erred in permitting the witness T. H. Neil, over defendants' objections, to read into the record and to the jury, section 317 and section 318 of the Postal Laws and Regulations [433] of 1913, and in overruling defendants' objections thereto, as follows:

"Q. Calling your attention, Mr. Neil, to regulations 317 and 318, I will ask you what they cover.

Mr. CLARK.—If the Court please, we object; they are not pleaded or set forth in the complaint; there is absolutely no allegation set forth in the complaint referring to them or anything based upon it.

The COURT.—Objection overruled.

Mr. CLARK.—Exception.

The COURT.—Exception allowed.

A. The number of that, please.

Q. It is regulation 317 and 318.

A. Section 317 of the 1913 Postal Laws and Regulations relates to the liability of a postmaster, not affected by taking bonds from clerks.

Q. Will you read that regulation?

Mr. CLARK.—To which we object, if the Court please, as no foundation laid, not within the issues in this case, and absolutely no basis in the second amended complaint for the intro-

duction of any regulation except the four that have been pleaded, and this is a variance from the allegations of their complaint.

The COURT.—Objection overruled.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

A. Section 317 of the 1913 Postal Laws and Regulations provides that: 'The taking of bonds by the United States directly from assistant postmasters and clerks in postoffices does not in anywise affect the liability of postmasters upon their official bonds for the proper discharge of all the duties of their office and the due accounting for all public funds which may be in, or come into, their custody as postmaster; and postmasters and their sureties are responsible on their official bonds to the same extent as theretofore for the defaults and defalcations of their subordinates. The bonds taken from assistants and clerks in postoffices are simply additional security, of which the United States may avail itself in case of loss.'

Q. Now, Mr. Neil I will ask you if clerks in the postoffices handling—

A. I didn't read 318; do you want that?

Q. I will ask you if there is a regulation providing, in second-class postoffices, clerks handling mail, stamps, or valuable packages, shall be bonded.

Mr. ROTH.—We object to that as incompetent, irrelevant, and immaterial, no proper foundation, and not within the issue of this case.

The COURT.—Overruled.

A. Section 318 of the 1913 Postal Laws and the Regulations provides as follows: 'All employees of first and second class postoffices who handle money, stamps, or valuable packages, and assistant postmasters at first, second, and third class offices shall furnish bonds executed to the United States, in accordance with the form prescribed by the department. The bonds given to the [434] United States by clerks and employees in postoffices under the roster designation shall apply to and cover the faithful discharge of all duties and trusts imposed upon *the* them, and the due accounting of all moneys which may come into their possession while performing the duties of any other clerk or employee, or of any position under any other roster designation or classification whatever. The amount of bond in each instance shall be fixed by the Postoffice Department, upon the advice of the postmaster, according to a schedule printed in the annual Postal Guide. It is preferred that bonds furnished by one of the surety companies authorized to act as sureties on official bonds be given. Postmasters may represent the employees of their offices in negotiating premium rates with surety companies, but shall not solicit or accept commissions from such companies, nor seek to compel their clerks to do business with any particular company. The premium on bonds shall be paid by the employees fur-

nishing them. Postmasters shall report to the First Assistant Postmaster-General, Division of Salaries and Allowances, the failure of any employee to pay the premium on his bond within 15 days after it is due. Applications for forms for bonds and lists of surety companies that will be accepted thereon, and all correspondence relative to bonds of clerks or assistant postmasters, should be addressed to the First Assistant Postmaster-General, Division of Salaries and Allowances. Bonds of Assistant postmasters and clerks in post-offices may be accepted by the First Assistant Postmaster-General for and on behalf of the Postmaster-General, and shall be filed in the office of the First Assistant Postmaster-General, Division of Salaries and Allowances.'

Q. I will ask you, Mr. Neil,—

A. (Interrupting.) Wait a minute. This section 318 was amended on May 1, 1916. Now I will state in the matter of the amendment. In 1913, the Postal Laws and Regulations, this edition, was published, and each month there is a monthly supplement to the annual Postal Guide, in which the Postmaster-General prints the amendment to the Postal Laws and Regulations. The postmaster is required to cut those out and paste them into the Postal Laws and Regulations over the particular section amended. On May 1, 1916, section 318 of the 1913 Postal Laws and Regulations was amended as follows: 'Section 318. Postal Laws and Regulations, is

hereby amended by the addition of the following paragraph: 9. It is the duty of the postmasters of all classes to see that only clerks and employees who are under bond are permitted to handle money, stamps, and registered mail, and postmasters will be held responsible for any losses of such matter chargeable to an unbonded employee entrusted with such matter in disregard of this provision.' "

(63) The Court erred in permitting the witness T. H. Neil, over defendants' objections, to testify as follows:

"Q. Mr. Neil, I will ask you if you have a regulation regarding postal employees being prepared at any time to make affidavit as to particular pieces of mail, particularly section 898? If you have such regulation, I will ask you to read 896 and 898 both.

A. Yes, we have. [435]

Mr. ROTH.—We object to that, if the Court please, upon the ground the same is irrelevant, incompetent and immaterial, that it is not pleaded in the complaint, that there is no statement of fact set forth in the complaint that covers the section called for, and that it is in no way involved in the issues made up by the pleadings in this case. (Objection overruled. Defendants except. Exception allowed.)

A. Section 898 of the 1913 Postal Laws and Regulations provides as follows: 'Postal employees shall be prepared at any time to make affidavit that any particular registered piece,

jacket, sack, or pouch was either given to another employee of the postal service or left the office in a pouch properly locked and labeled, and was sent by the proper route. When practicable, two persons should be present at and witness the pouching of the dispatch, and also the receipt of registered mail, and write their names or initials as evidence thereof in the transit, delivery, or other proper record. In dispatching registered with ordinary mail, the registered matter shall be placed in the pouch last, just before the pouch is locked and delivered to the person authorized to receive it.' That is paragraph 1. Well, I will read the whole paragraph, I mean the whole section. 'In dispatching and delivering registered mail it shall be arranged, as far as possible, in the order in which it is entered on the dispatching record or accompanying registered-package receipt or manifold bill.'

Q. Calling your attention to regulation 196, I would like for you first to read that regulation and then demonstrate, if you can, what is meant by it.

Mr. CLARK.—Now, if the Court please, we object as incompetent, irrelevant, and immaterial, not within any of the issues in the case, not one of the sections specifically mentioned, and is a variance from the allegations of their complaint and an attempt to prove something that is not set forth in the complaint.

The COURT.—I will sustain the objection

on the ground that the witness should not be required to demonstrate the meaning of the section, but he may read it.

Mr. CLARK.—We note an exception to the latter part of the Court's ruling.

The COURT.—The exception will be allowed.

Q. Just read the section, then, Mr. Neil.

A. Section 896 of the 1913 Postal Laws and Regulations provides that: 'Registered matter and package receipts shall not be dispatched in a newspaper or tie sack, except when the use of lead-sealed sacks is specially authorized. When dispatched in iron-lock or brass-lock pouches, registered matter shall be tied with the ordinary mail, whenever practicable, and placed on the top of the local of No. 1 working package, immediately under the facing slip, together with the registered-package card, receipt, or sheet bill. Registered mail shall not be included in city packages, unless inclosed in a direct pouch for the city addressed, nor in State packages. When there is special-delivery mail and registered mail for dispatch at the same time, the former should be placed immediately under the facing slip on [436] top of the latter. The word "Registered," in bold letters, shall be plainly stamped or marked on the facing slip covering the package containing the registered matter. Registered matter that cannot be tied with

the ordinary mail should not be enclosed, if possible, in unaddressed, unnumbered, and unsealed registered jacket envelopes, used merely as containers for small registered parcels that might become mislaid; otherwise the registered articles should be placed loose in the pouch.' "

(64) The Court erred in permitting the witness T. H. Neil, over defendants' objections, to testify concerning certain regulations in the Postal Guide of 1914, as follows:

"Q. I hand you the Postal Guide of 1914. Referring to the Postal Guide of 1914, Mr. Neil,—I will ask you something preliminary to that. Do you know, Mr. Neil, when Mr. Deal was first appointed postmaster?

A. June 29, 1914.

Q. Have you the 1914 Postal Guide there?

A. This is the only postal guide, of July 1st, 1914.

Q. Calling your attention to page 83, I will ask you if it provides on page 83, I believe it is section 84 on that page, regarding the sealing of registered jackets, if there is a regulation there. A. Yes.

Mr. CLARK.—We object on the ground it is incompetent, irrelevant and immaterial. They are attempting to prove something from the Postal Guide. No allegation, no reference made to the Postal Guide in the complaint, no allegation that there is any violation of any-

thing except the regulations, a complete variance from the allegations of the complaint, and absolutely no foundation laid for it, nothing to show in their bond that they are governed by the rules of the Postal Guide. All that the bond provides is they shall obey the law and the regulations. Now they are attempting to prove something here that is not referred to in their complaint, and we object for that reason.

The COURT.—The objection will be overruled.

Mr. CLARK.—We note an exception.

The COURT.—Exception allowed.

Q. Go ahead, Mr. Neil.

A. Paragraph 84 of the July 1st, 1914, Postal Guide provides as follows—

Mr. CLARK.—(Interrupting.) One moment. We further object, if the Court please; it isn't shown that a copy of this Postal Guide was furnished to the postmaster and that he had no knowledge of it.

Mr. CRANE.—Mr. Neil testified that the postmaster was furnished with the Laws and Regulations, to gether with the Postal Guides and the amendments thereto, and I have shown Mr. Deal was postmaster at that time. However, I can ask him the question again if the Court wishes me to.

The COURT.—The objection will be overruled.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

A. (Reading.) 'It is noted that in some instances registered [437] paper jackets have not been securely sealed. All postal employees making up such jackets will see that all of the gummed surface is properly moistened and the jackets securely sealed. In sealing the jackets extreme care should be taken to avoid removing the mucilage from the sealing flap in moistening. Before moistening the gummed surface of the sealing flap, that portion of the jacket which will be covered by the flap should be moistened, which will render the paper more porous and tend to secure a more satisfactory sealing. Jacket envelopes must be kept where they will not be subjected to excessive dampness or heat.'

Mr. ROTH.—If the Court please, we move to strike this last answer, on the ground and for the reason that as stated by the witness, that it is contained in the Postal Guide of 1914, whereas, the Government has introduced in evidence here section 896 of the Postal Laws and Regulations of 1913, which have set aside and repealed the regulation read by the witness at this time.

Mr. CRANE.—If the Court please, 1913 can't set aside and repeal the 1914 regulations. Counsel should know that.

Mr. ROTH.—But that is a Postal Guide and this is a Postal Regulation.

The COURT.—The objection will be overruled.

Mr. ROTH.—Exception.

The COURT.—Exception allowed.

Q. Mr. Neil, have you the 1920 Postal Guide? A. I have.

Q. I will ask you where you got that Postal Guide?

A. Out of the Fairbanks, Alaska, postoffice.

Q. I will ask you if that Postal Guide was furnished to Mr. Deal while he was postmaster?

A. It has Mr. Deal's signature on the face of it, cover of it.

Q. All right. Turning to page 99 of that Guide, paragraph 20, I believe it is, I will ask you if that is an amendment to a regulation, or a later regulation, and if so, what it provides?

A. Paragraph 20 of the July 1st, 1920, Annual Postal Guide provides as follows—

Mr. ROTH.—One moment. Is that an amendment to a regulation?

A. That is a regulation of the Postmaster-General,—instructions how to conduct the postal service.

Q. Is that a later regulation than the 1913 regulation? A. It is.

Mr. ROTH.—Then if the Court please, we object as irrelevant, incompetent, and immaterial, and no foundation laid, is a variance from the allegations of the complaint, it is not pleaded in the second amended complaint, it is not set forth as a basis for any alleged negligence on the part of the defendant in this case.

The COURT.—Objection overruled.

Mr. ROTH.—Note an exception.

The COURT.—Objection allowed.

Q. Go ahead and read it.

A. 'Registered articles known or presumed to contain large values, such as coin, currency, securities, etc., to be made the object of special care, in so far as practicable, both at postoffices and while in transit: Such [438] articles, as far as practicable, should be given proper vault or safe protection, handled under the supervision of responsible supervisory officials or employees, and such receipts should be taken, and care exercised in billing and checking as will make it possible to place responsibility in cases of loss or depredation. At massing points in large offices or large R. P. O.'s, where the ordinary run of registered mail is, in special cases transferred by bulk, exception should be made, in so far as practicable, to articles apparently of large value and detailed receipt obtained for such mail. Day R. P. O. dispatches of registered mail of large value

are preferable to night dispatches and in so far as practicable postmasters should advise the senders of such matter to present it, if possible, in time for inclosure in day R. P. O. dispatches. Prompt report should be made to the Department, through proper channels, of any instance noted where it is believed that registered mail—particularly that known to be of more than nominal value—is not given adequate safeguards either in transit or in post-offices.' "

(65) The Court erred in sustaining plaintiff's objection to certain questions asked of the witness T. H. Neil on cross-examination, as follows:

"Q. You have heard the testimony in regard to how that package was made up, haven't you, Mr. Neil? A. Yes, I have.

Q. Yes, you have heard. Wherein was the particular method of sending that package at variance with the regulations of the Postoffice Department?

A. In making up the package at night, as Miss Smith testified she made it up—

Q. (Interrupting.) No, I am referring to the jacket and the container. We will take that first. Where did the method of putting it into the—method of sending it in the container that way, where did it violate the postal regulations?

Mr. CRANE.—Object as not proper cross-examination.

The COURT.—Objection sustained.

Mr. CLARK.—Does the Court mean that we can't ask him anything in connection with the postoffice regulations?

The COURT.—His opinion isn't material. We are hearing all the testimony on the subject here, and it is for the jury to determine whether he has violated any of the postal laws and regulations or not.

Mr. CLARK.—Well, we note an exception, if the Court please.

The COURT.—Exception allowed."

(66) The Court erred in refusing to permit the defendants to have the witness D. Tunison make up a package from the exhibits introduced in the case to show, as nearly as possible, the condition of the registered package alleged to have been rifled, when it came into his possession at Nenana, Alaska, when said witness [439] was called on behalf of the defendants, under the following circumstances, to wit:

"(By Mr. CLARK.)

Q. Mr. Tunison, can you take these various exhibits, consisting of the magazine, the wrapping paper, the canvas sack, the sack of coin, and the registry jacket,—can you fix those up and show substantially the condition of that package when it came into the office at Nenana, when you took it and laid it on Mrs. Williams' desk?

Mr. CRANE.—If the Court please, that is

objected to as repetition, that this witness demonstrated this at one time here.

Mr. CLARK.—No, he merely put the magazine in the canvas sack.

Mr. CRANE.—I believe he wrapped it up and put it in the canvas sack. And furthermore, this witness is not qualified, as he didn't testify taking it out of the registry sack.

The COURT.—I think the objection ought to be sustained. The only thing the witness can do now is to put the canvas sack and its contents into the registered jacket. He has already demonstrated how it was, as far as he could tell without putting it into the registered envelope or jacket, and the jury can very readily understand the character of the package by the demonstration that has already been made.

Mr. CLARK.—Well, what I was asking him to do was to put it in the condition he had it yesterday, then put it in the registered jacket to show, as near as possible, the condition when it came into the office.

Mr. CRANE.—May I ask one question preliminarily?

The COURT.—No, not now, Mr. Crane; you can do so some other time if you care to.

Mr. CLARK.—Well, will the Court permit that to be done?

The COURT.—I think I sustain the objection, Mr. Clark, in my previous ruling.

Mr. CLARK.—To which we note an exception.

The COURT.—An exception will be allowed."

(67) The Court erred in sustaining plaintiff's objections to a question asked of the defendant T. H. Deal, as follows:

"Q. State whether or not, if you know, this package, this registered package, was delivered by you to Mr. Larry Lillico in the same condition that it was received by you in the afternoon or evening of the 15th of September, 1921.

Mr. CRANE.—That is objected to as incompetent, irrelevant, and immaterial, a proper foundation not having been laid, and calling for a conclusion and opinion of the witness.

The COURT.—Objection sustained.

Mr. ROTH.—We except.

The COURT.—Exception allowed."

(68) The Court erred in sustaining plaintiff's objection to a question asked of defendant's witness T. H. Deal, as follows: [440]

"Q. Mr. Deal, you are acquainted with Mr. E. A. Hering,—Ed Hering? A. Yes.

Q. Was he employed in the postoffice under you at any time? A. Yes.

Q. When did he cease his regular employment in there, if you know? Well, never mind about that; he has already testified about that. But after he ceased as a regular employee in there, I will ask you to state whether or not

he was an authorized person by you to come in there and assist in handling the mail?

A. He did.

Mr. CRANE.—Objected to, if the Court please, as incompetent, irrelevant and immaterial, and be self-serving on the part of the defendant; and besides it is covered by the postal laws and regulations, and it hasn't been shown here that any authority existed for the postmaster to authorize any person to be in there.

The COURT.—Objection sustained.

Mr. ROTH.—We except.

The COURT.—Exception sustained."

(69) The Court erred in sustaining plaintiff's objection to questions asked of the witness T. H. Deal, as follows:

"Q. You may state whether or not Mr. Wetzler had been in your office at different times prior to the 15th day of September, 1921.

A. Yes.

Q. Many times? A. Many times.

Q. Prior to that time, I will ask you to state whether or not Mr. Wetzler was familiar with your method of making up registered mail?

A. Yes.

Mr. CRANE.—Objected to, if the Court please, as incompetent, irrelevant, and immaterial.

The COURT.—Objection sustained.

Mr. ROTH.—We except.

The COURT.—Exception allowed."

(70) The Court erred in overruling defendants' objections to questions asked of the defendant T. H. Deal concerning the franking stamp on the registered package, as follows:

"Q. I will ask you to look at it (referring to the registered package), Mr. Deal, and see if there is any postage on there besides the ten cents. A. Well, I say there wasn't.

Q. Why? (Defendants object as immaterial, irrelevant and incompetent. Objection overruled. Exception.)

Q. Go ahead and answer the question.

A. It was franked through.

Q. Why was it franked through? (Defendants object as irrelevant, incompetent and immaterial, the postmaster is not supposed to know why an article is franked. Objection overruled. Exception.)

A. I said it was franked through by the Government. [441]

Q. I asked you why it was franked through by the Government.

A. By the Government.

Q. Why?

A. Well, because they got orders to that effect somewhere.

Q. That isn't the reason why, Mr. Deal. Go ahead and tell me why.

A. Well, what is it? I don't know.

Q. You don't know why?

A. No, only I say the Government—it was just franked through, and that goes without stamps.

* * * * * * * * * *

Q. Isn't it a fact, then, that the reason that the postage wasn't paid on this was because it was Government property?

Mr. ROTH.—That is objected to on the ground that the same is irrelevant, incompetent, and immaterial. That doesn't follow by any means, if the Court please. The district attorney's office is franking letters out all the time.

Mr. CRANE.—They are all on official business, too.

The WITNESS.—It isn't Government property.

The COURT.—Objection overruled.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

* * * * * * * * * *

Q. Now, isn't it a fact Mr. Deal, that the reason this was franked through was that the bank was provided with frank labels in order to send Government property to the Alaska Railroad?

Mr. ROTH.—We object to that on the ground the same is irrelevant, incompetent, and immaterial, no proper foundation laid for the introduction of the testimony, and this witness

is not supposed—in cross-examination the witness is not supposed to know that.

The COURT.—Objection overruled.

Mr. ROTH.—We except.

The COURT.—Exception allowed.

A. Well, they would get it from the Government to frank these things through.

Q. What do you mean by 'these things'?

A. I mean anything they would wish to send.

Q. And anything they would wish to send would be Government property, would it not?

Mr. ROTH.—We object to that on the ground the same is irrelevant, incompetent, and immaterial. It is not true necessarily that anything that they would wish to send would be Government property.

The COURT.—The witness can answer.

Mr. ROTH.—We except to the ruling of the Court.

The COURT.—Exception allowed.

A. I don't know that.

Q. You know that anything to be franked must be official business or Government property, don't you?

Mr. ROTH.—We object to that on the ground the same is irrelevant, incompetent, and immaterial. It is supposed to be; might not be. People are being prosecuted and convicted for using that frank without authority, so everything that is franked is not properly franked.

The COURT.—The witness may answer.

Mr. ROTH.—We except.

The COURT.—Exception allowed." [442]

(71) The Court erred in sustaining plaintiff's objection to questions propounded to the witness E. A. Hering on behalf of the defendants, as follows:

"Q. While you were working in the post-office, Mr. Hering, were you the dispatching clerk? A. I was.

Q. Was Mr. Wetzler in the office very often?

A. Part of the time he was stationed here in Fairbanks, was in the office every day. At other times he was away, but he was in quite frequently.

Q. Did he ever object to any of the methods that you were pursuing in dispatching mail?

Mr. CRANE.—Objected to, if the Court please, as incompetent, irrelevant, and immaterial.

The COURT.—Objection sustained.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed."

(72) The Court erred in excluding the testimony of George Bentley as a witness on behalf of the defendants, in regard to the size of a package that would be made by the bills used in the original package that was rifled, and in refusing to permit said witness to testify as to the result of his experiments in regard to preparing a dummy package similar to the package prepared by him and

originally shipped by him on the 15th day of September, 1921, as shown by the following circumstances, to wit:

"(By Mr. CLARK.)

Q. Mr. Bentley, since you were on the stand, have you, at the request of the attorneys for the defendants in this case, made up a stack of bills containing the same number that was in that package that was dispatched, and measured the size of a package that would make?

A. Yes, I have.

Q. Did you do it over here at the First National Bank? A. Yes, this morning.

Q. Did you put in the same number of bills that was in that package? A. Yes, exactly.

Q. Did you compress them as the package was compressed that you sent in that sack that day? A. Yes.

Q. Then did you measure the size of the package? A. Yes.

Q. What were the measurements?

Mr. CRANE.—Just a minute, now, Mr. Bentley. Objected to, if the Court please, as incompetent irrelevant, and immaterial; the proper foundation has not been laid; and further, it is not shown that the bills used by Mr. Bentley in this experiment were new or old bills; and it has not been shown whether the bills sent that day were old or new bills, or that the bills which he experimented with were the same condition as the bills sent that day. [443]

Mr. CLARK.—I will ask a few more questions before I ask that, if the Court will permit.

Q. Do you remember the character of the bills that were sent out on that shipment, Mr. Bentley, that shipment of September, 1921?

A. Well, I have a fair recollection of what they were, yes.

Q. Were they new bills or old bills?

A. Most of them were new.

Q. In the package that you made up to-day, what kind of bills did you use?

A. I used mostly new ones.

Q. And did you endeavor—what did you do as regards making it as near like the original package as you could?

A. I endeavored to make it as near as I could, and I told them I wanted most of the tens and twenties new.

Q. And that is about what the other bills were that you shipped the other time?

A. Yes, as I recollect, they were mostly all new.

Q. The new bills and the old bills are about the same thickness?

A. Well, the new bill can become more compact than the old ones.

Q. And your package to-day was mostly new bills?

A. Was mostly new bills, yes, sir.

Q. Of what were the denominations in that package which you made up comprised?

Mr. CRANE.—Objected to as incompetent, irrelevant, and immaterial.

The COURT.—Did you put any silver in the package that you measured?

A. No, sir, I did not.

The COURT.—Sustain the objection.

Mr. CLARK.—Well, if the Court please, I want to call the Court's attention to this. All I am asking for is the denominations of the bills themselves. The testimony that the witness gave on the stand was that the silver was separate and distinct from the other package. All I am asking now is what size package those bills themselves would make. That is the reason, and I ask the Court to take that into consideration.

The COURT.—The objection is sustained.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed."

(73) The Court erred in excluding the testimony of said witness, George Bentley, and refusing to permit him to testify as to the results of his measurements and as to the size of the package that the bills would make. [444]

ASSIGNMENTS OF ERROR TO COURT'S RULINGS ON AMENDED MEMORANDUM OF COSTS AND DISBURSEMENTS.

(74) The Court erred in refusing to re-tax the costs allowed to A. H. Keller, L. A. Fairborn, Frank Doner, George Bentley, Mrs. E. A. Williams, P. O. Wrangstedt, and W. B. Raeburn, and

in allowing them the full amount of mileage and per diem set forth in the cost bill, and in refusing to re-tax said costs and allow each of said witnesses mileage for but two hundred miles and per diem for the time actually consumed in traveling one hundred miles to Fairbanks and one hundred miles from Fairbanks, and for the days they were actually in attendance on said Court in the trial of said cause, and in allowing said witnesses the full amount of mileage set forth in said cost bill and per diem for the full number of days set forth therein.

(75) The Court erred in allowing any witness fees or mileage to the witness James Hagan, a deputy United States marshal.

(76) The Court erred in sustaining the clerk's taxation of the costs respecting the witnesses A. H. Keller, L. A. Fairborn, Frank Doner, George Bentley, Mrs. E. A. Williams, P. O. Wrangstedt, W. B. Raeburn, and James Hagan.

Dated at Fairbanks, Alaska, on this, the fourth day of May, A. D. one thousand nine hundred twenty-five.

R. F. ROTH,
Attorney for Defendant T. H. Deal.
JOHN A. CLARK,
Attorney for Defendant United States Fidelity and Guaranty Company, a Corporation.

Due service hereof admitted this 4 May, 1925.
JULIEN A. HURLEY,
United States Attorney and Attorney for Plaintiff.

[445]

[Title of Court and Cause.]

Filed May 4, 1925.

PETITION FOR WRIT OF ERROR.

T. H. Deal and the United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, defendants in the above-entitled action, feeling themselves, and each of themselves, aggrieved by the general verdict of the jury, rendered herein on the 20th day of February, 1925, and the judgment of the Court made and entered herein, in pursuance of said verdict, on the 3d day of March, 1925, for the sum of $9,900.00, together with interest thereon at the rate of eight per centum per annum from the 16th day of September 1921, and the judgment of the above-entitled court, duly made and entered in the above-entitled cause on the 4th day of May 1925, on an appeal from the taxation of costs by the clerk of the above-entitled court on plaintiff's cost bill, which said judgment of said District Court fixed and taxed said cost bill in favor of plaintiff and against defendants at the sum of $3,036.85, now come John A. Clark, attorney for United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, and R. F. Roth, attorney for T. H. Deal, defendants above named, and petition this Honorable Court for an order allowing said defendants to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, at the [446] city of San Francisco, State of California, according to the laws in

that behalf made and provided; and whereas said defendants desire a stay of execution pending the hearing of said writ of error by said United States Circuit Court of Appeals for the Ninth Circuit;

Now, therefore, said defendants petition that an order be made fixing the amount of the security which shall be given and furnished on said writ of error to cover the costs incurred therein and as a supersedeas, and that, on the giving of such security, all further proceedings in this court herein may be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, state of California;

And your petitioners will ever pray.

JOHN A. CLARK,

Attorney for Defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, a Corporation.

R. F. ROTH,

Attorney for Defendant T. H. Deal.

Due service hereof admitted this 4th day of May, 1925.

JULIEN A. HURLEY,

Attorney for Plaintiff. [447]

[Title of Court and Cause.]

Filed May 4, 1925.

ORDER ALLOWING WRIT OF ERROR AND FIXING SUPERSEDEAS AND COST BOND.

On motion of John A. Clark and R. F. Roth, attorneys for the defendants above named, and the filing of a petition for writ of error and assignment of error, it is hereby ordered that a writ of error be, and the same is, hereby allowed, to have reviewed by the Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, state of California, the judgment heretofore made and entered herein on the verdict of the jury, duly rendered in said cause, said judgment being dated the third day of March, A. D. one thousand nine hundred twenty-five, and the judgment of this Court rendered on the appeal from the decision on taxation of costs by the clerk of this court, which said judgment of this Court thereon was given and made on the 4th day of May, A. D. one thousand nine hundred twenty-five, and that the amount of the bond on said writ of error be, and it is, hereby fixed at the sum of seventeen thousand ($17,000.00) dollars, to cover supersedeas and costs of defendant in error.

Done at Fairbanks, Alaska, on this fourth day of May, A. D. one thousand nine hundred twenty-five.

CECIL H. CLEGG,
District Judge.

Due service hereof admitted this —— day of May, 1925.

_____,

Attorney for Plaintiff.

Entered in Court Journal No. 16, page 310: [448]

[Title of Court and Cause.]

Filed May 4, 1925.

ORDER RELATIVE TO SUPERSEDEAS BOND ON WRIT OF ERROR.

The defendants having, on this day, filed their petition for writ of error from the verdict and judgment thereon made and entered herein on the third day of March, A. D. one thousand nine hundred twenty-five, and the judgment of this court fixing and taxing costs in favor of plaintiff and against defendants, given, made and entered on the 4th day of May, A. D. one thousand nine hundred twenty-five, to the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, together with their assignments of error, within due time, and also praying that an order be made fixing the amount of security which defendants shall give and furnish on said writ of error, and that, on the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said Circuit Court of Appeals for the Ninth Circuit, and said petition having been, on this day, duly allowed and supersedeas and cost bond fixed;

Now, therefore, it is ordered that, on defendants filing with the clerk of this court a good and sufficient bond in the sum of seventeen thousand dollars, conditioned as a cost and supersedeas bond, all as provided by law, which bond shall be approved by this court, then and thereafter all proceedings in ths court shall be, and they are, suspended and stayed, [449] until the determination of said writ of error by the Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California.

Done at Fairbanks, Alaska, on this, the fourth day of May, A. D. one thousand nine hundred twenty-five.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 16, page 310.

Due service of the foregoing order admitted this —— day of May, 1925.

_____,
Attorney for Plaintiff. [450]

[Title of Court and Cause.]

Filed May 4, 1925.

SUPERSEDEAS BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, That we, T. H. Deal, of Fairbanks, Territory of Alaska, and United States Fidelity and Guaranty Company, a corporation, of Baltimore, State of Maryland, as principals, and United States Fidelity

and Guaranty Company, a corporation, of Baltimore, State of Maryland, as surety, are held and firmly bound unto the defendant in error, the United States of America, plaintiff in the above-entitled action, in the just and full sum of seventeen thousand dollars, to be paid to the said defendant in error, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors in interest, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this fifth day of May, A. D. one thousand nine hundred twenty-five.

Whereas, on the third day of March, A. D. one thousand nine hundred twenty-five, in the United States District Court for the Territory of Alaska, Fourth Judicial Division, a judgment was rendered against the defendants T. H. Deal and United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, in the sum of ninety-nine hundred dollars, together with interest thereon at the rate of eight per cent per annum from the sixteenth day of September, A. D. one thousand nine hundred twenty-one, and costs;

AND WHEREAS, on the fourth day of May, A. D. one thousand nine hundred twenty-five, the above-entitled court, in the above-entitled cause, entered an order taxing costs [451] against the defendants and each of them in the sum of approximately three thousand thirty-six dollars eighty-five cents, and said defendants have obtained a writ of error and filed a copy thereof in the office of the clerk of said court, to reverse the two judgments

aforesaid, and a citation directed in said action to the United States of America, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, on the —— day of June, A. D. one thousand nine hundred twenty-five;

AND WHEREAS, the plaintiffs in error desire a stay of execution in the above-entitled action pending the above-mentioned appeal, and the Court having fixed the supersedeas and cost bond in the sum of seventeen thousand dollars;

NOW the condition of the foregoing obligation is such that, if the said defendants T. H. Deal and United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, shall prosecute said writ of error to effect and answer and pay all judgments, damages, and costs, if they fail to make their said plea good, then the foregoing obligations to be void, otherwise to remain in full force, effect, and virtue.

T. H. DEAL,
Principal.
By R. F. ROTH,
His Attorney.

[Seal of U. S. F. & G. Co.]

UNITED STATES FIDELITY & GUARANTY COMPANY,
Principal.
By E. H. MACK,
And JOHN A. CLARK,
Its Attorneys-in-fact.

UNITED STATES FIDELITY & GUARANTY COMPANY,

Surety.

By E. H. MACK,

Attorney-in-fact.

And JOHN A. CLARK,

Attorney-in-fact.

The foregoing bond is hereby accepted as to amount and sufficiency [452] of surety.

JULIEN A. HURLEY,

Attorney for Plaintiff.

The foregoing bond is hereby approved this fourth day of May, A. D. one thousand nine hundred twenty-five.

CECIL H. CLEGG,

District Judge. [453]

[Title of Court and Cause.]

Filed May 8, 1925

WRIT OF ERROR.

United States of America,

Territory of Alaska,—ss.

The President of the United States of America to the Honorable CECIL H. CLEGG, Judge of the United States District Court for the Territory of Alaska, Fourth Division, GREETING:

Because, in the records and proceedings, as also in the rendition of a judgment, dated the third day

of March, A. D. one thousand nine hundred twenty-five, and in the rendition of a judgment of the Court, fixing and taxing cost bill, dated the 4th day of May, A. D. one thousand nine hundred twenty-five, in a plea which is in said United States District Court for the Territory of Alaska, Fourth Division, before you, between the United States of America as plaintiff and T. H. Deal and the United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, as defendants, manifest error hath happened, to the great prejudice and damage of the said United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, and of the said T. H. Deal, as is said and appears in the petition herein;

We, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties [454] aforesaid, in this behalf, do command you, if said judgment be therein given, then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, together with this writ, so as to have the same at said place, in said Circuit Court, on the 8 day of June, A. D. one thousand nine hundred twenty-five, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein, to correct such

error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this eighth day of May, A. D. one thousand nine hundred twenty-five.

ATTEST my hand and the seal of the United States District Court for the Territory of Alaska, Fourth Judicial Division, at the Clerk's Office in the Town of Fairbanks, Territory of Alaska, on this, the 8th day of May, A. D. one thousand nine hundred twenty-five.

[Seal] ROBT. W. TAYLOR,
Clerk of the District Court for the Territory of Alaska, Fourth Division.

Allowed this 8th day of May, A. D. one thousand nine hundred twenty-five.

CECIL H. CLEGG,
Judge of the District Court for the Territory of Alaska, Fourth Division.

Due service of the foregoing writ of error admitted this 8 day of May, A. D. one thousand nine hundred twenty-five.

JULIEN A. HURLEY,
By E. B. COLLINS,
Attorney for Defendant in Error. [455]

[Title of Court and Cause.]

Filed May 8, 1925.

CITATION ON WRIT OF ERROR.

The President of the United States of America to the United States of America, and to JULIEN A. HURLEY, United States District Attorney, and FRED D. CRANE, Assistant United States District Attorney, for the Territory of Alaska, Fourth Judicial Division, Attorneys for Defendant in Error:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city and county of San Francisco, State of California, within thirty days from the date of this citation, pursuant to the writ of error filed in the office of the Clerk of the United States District Court for the Territory of Alaska, Fourth Judicial Division, wherein T. H. Deal and United States Fidelity and Guaranty Company, of Baltimore, Maryland, a corporation, are plaintiffs in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in error in that behalf.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States of America, on this, the 8th day of May, A. D. one thousand nine hundred twenty-five, and of our Independence one hundred forty-eight.

ATTEST my hand and the seal of the above-named District Court at Fairbanks, Territory of Alaska, on this, the 8th day of May, A. D. one thousand nine hundred ewenty-five.

CECIL H. CLEGG,
District Judge.

Due service of the foregoing citation admitted this 8th [456] day of May, A. D. one thousand thousand nine hundred twenty-five.

JULIEN A. HURLEY,
By E. B. COLLINS,
Attorney for Defendant in Error. [457]

[Title of Court and Cause.]

Filed May 8, 1925.

DESIGNATION OF PLACE FOR HEARING WRIT OF ERROR.

To the Honorable CECIL H. CLEGG, Judge of the Above-entitled Court, and to the Plaintiff and Its Attorney:

Come now the defendants, plaintiffs in error in the above-entitled cause, and pursuant to the provisions of the act of Congress, giving the designation of the place for hearing of writs of error to the plaintiff in error, do hereby designate the city and county of San Francisco, State of California as the place for the hearing of the writ of error in the above-entitled action.

Dated at Fairbanks, Territory of Alaska, on this, the 8 day of May, A. D. one thousand nine hundred twenty-five.

R. F. ROTH,
JOHN A. CLARK,
Attorneys for Defendants and Plaintiffs in Error.

Due service of the foregoing is hereby admitted this 8 day of May, A. D. one thousand nine hundred twenty-five.

JULIEN A. HURLEY,
By E. B. COLLINS,
Attorney for Plaintiff and Defendant in Error.

[458]

[Title of Court and Cause.]

Filed May 8, 1925.

ORDER EXTENDING TIME TO AND INCLUDING JULY 15, 1925, WITHIN WHICH TO FILE AND DOCKET CAUSE ON WRIT OF ERROR.

This matter coming up for hearing on the motion of the defendants above named, plaintiffs in error, for an order extending the time within which to file and docket the record herein on writ or error with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, and it appearing to the satisfaction of this Court that the time allowed by law and the orders of this Court allowing said writ of error is insufficient for the purpose and that the

plaintiffs in error desire an extension of time until and including the fifteenth day of July, A. D. one thousand nine hundred twenty-five, within which to file and docket said cause as aforesaid, and good cause appearing to this Court why said time should be extended, and all and singular the matters in connection herewith being fully understood and considered by this Court,—

It is, therefore ORDERED that the plaintiffs in error be, and they are hereby, given and granted until and including the fifteenth day of July, A. D. one thousand nine hundred twenty-five, within which to file and docket their record on writ of error with the clerk of the United States Circuit Court of Appeals at San Francisco, State of California.

Done at Fairbanks, Alaska, on this, the 8th day of May, A. D. one thousand nine hundred twenty-five.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 16, page 313.

Due service hereof admitted this —— day of May, 1926.

JULIEN A. HURLEY,
By E. B. COLLINS,
Attorney for Plaintiff. [459]

[Title of Court and Cause.]

Filed May 8, 1925.

STIPULATION RELATIVE TO PRINTING OF RECORD.

It is hereby stipulated that, in printing the papers and records to be used on the hearing on the writ of error in the above-entitled cause, for the consideration of the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, the title of the court and cause in full on all papers shall be omitted, except on the first page of said record, and that there shall be inserted, in place thereof, in all papers used as a part of said record, the words "Title of Court and Cause"; also, that all endorsements on all papers used as a part of said record shall be omitted, except the clerk's filing marks and the admission of service.

Dated at Fairbanks, Alaska, on this, the 8 day of April, A. D. one thousand nine hundred twenty-five.

JULIEN A. HURLEY,
By E. B. COLLINS,
Attorney for Plaintiff.
R. F. ROTH,
JOHN A. CLARK,
Attorneys for Defendants. [460]

[Title of Court and Cause.]

Filed May 8, 1925.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To Mr. Rob't W. Taylor, Clerk of the Above-entitled Court:

You will please prepare transcript of the record in the above-entitled cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, on the writ of error heretofore perfected to said court, and will include in said transcript the following documents, papers, and records, to wit:

(1) Second amended complaint.
(2) Defendants' motion to make the second amended complaint more definite and certain.
(3) Order overruling said motion.
(4) Defendants' separate demurrers to the second amended complaint.
(5) Order overruling demurrers to second amended complaint.
(6) Separate answers of the defendants to second amended complaint.
(7) None made.
(8) Bill of exceptions and order allowing and settling same.
(9) Assignment of error.
(10) Petition for writ of error.

(11) Order allowing writ of error and fixing supersedeas bond.

(12) Order relative to supersedeas bond on writ of error.

(13) Undertaking on writ of error and supersedeas bond with order approving same.

(14) Writ of error.

(15) Citation on writ of error.

(16) Designation of place for hearing writ of error. [461]

(17) Order extending time within which to file and docket writ of error with the clerk of the Circuit Court of Appeals.

(18) Stipulation relative to printing record.

(19) Praecipe for transcript.

(20) Order for forwarding original exhibits to San Francisco.

(21) Any written opinions filed by the Court.

This transcript to be prepared as required by law and the orders and rules of the above-entitled court and of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the clerk of the United States Circuit Court of Appeals, at San Francisco, State of California, on or before the fifteenth day of July, A. D. one thousand nine hundred twenty-five, pursuant to the order of this Court extending time, on file herein.

Dated at Fairbanks, Alaska, on this, the 8th day

of May, A. D. one thousand nine hundred twenty-five.

R. F. ROTH,
Attorney for Defendant T. H. Deal.
JOHN A. CLARK,
Attorney for Defendant United States Fidelity and Guaranty Company of Baltimore, Maryland, a Corporation.

Due service hereof admitted this 8th day of May, 1925.

JULIEN A. HURLEY,
_____,
Attorneys for Plaintiff. [462]

[Title of Court and Cause.]

Filed May 8, 1925.

ORDER FOR FORWARDING EXHIBITS.

This matter coming on for hearing on the petition of the defendants above named for an order of this Court directing the clerk of this court to forward to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, to which court a writ of error is being sued out in the above-entitled cause to reverse the judgment heretofore rendered, all the original exhibits introduced in said cause, with the exception of the mail-sack introduced, as an exhibit on the part of plaintiff, and good cause appearing therefor and the Court being fully advised in the premises;

IT IS ORDERED that the clerk of this court, when forwarding the record in said cause to the said Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, also forward to said court, as a part of the record in said cause, all exhibits introduced on behalf of plaintiff and defendants in the above-entitled cause, with the exception of the mail-sack introduced as one of said exhibits by the plaintiff above named.

Dated this 8th day of May, A. D. one thousand nine hundred twenty-five.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 16, page 313.
[463]

[Title of Court and Cause.]

Filed May 14, 1925.

ORDER MODIFYING AND AMENDING ORDER FOR FORWARDING EXHIBITS.

This Court having heretofore made an order for the transmission of all the original exhibits in the above-entitled cause to the Circuit Court of Appeals, and it appearing to this Court that, among other exhibits, was a small bag containing a trifle over thirty dollars in silver of small denominations, and that the attorneys for the plaintiff in error do not insist on said silver being forwarded to the Circuit Court of Appeals and con-

sent to the retention thereof by the clerk of this court;

Now, therefore, IT IS ORDERED that the order heretofore made by this Court, directing that all the exhibits, with the exception of the mail-sack, introduced as exhibits on the trial of said cause, be forwarded to the Circuit Court of Appeals, be, and it is hereby, modified and amended so as to read that all the original exhibits introduced on the trial of said action, with the exception of the mail-sack and the small bag containing silver, be forwarded by the clerk of this court to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, etc.

Dated at Fairbanks, Alaska, on this, the 14th day of May, A. D. one thousand nine hundred twenty-five.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 16, page 315. [464]

[Endorsed]: No. 4631. United States Circuit Court of Appeals for the Ninth Circuit. T. H. Deal and United States Fidelity and Guaranty Company of Baltimore, Maryland, a Corporation, Plaintiffs in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District

Court of the Territory of Alaska, Fourth Division.
Filed July 7, 1925.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: Printed Transcript of Record. Filed July 27, 1925. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 4631

United States
Circuit Court of Appeals
For the Ninth Circuit.

T. H. DEAL and UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Upon Writ of Error to the United States District Court of the Territory of Alaska, Fourth Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1925, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Tuesday, the first day of December, in the year of our Lord one thousand nine hundred and twenty-five. Present: Honorable WILLIAM H. HUNT, Circuit Judge, Presiding; Honorable FRANK H. RUDKIN, Circuit Judge; Honorable WALLACE McCAMANT, Circuit Judge.

No. 4631.

T. H. DEAL and UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, a Corporation,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

ORDER OF SUBMISSION.

ORDERED above-entitled cause argued by Mr. Geo. E. Stoker, counsel for the plaintiffs in error, and by Mr. Julian A. Hurley, United States Attorney, counsel for the defendant in error, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1925, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the fifteenth day of February, in the year of our Lord one thousand nine hundred and twenty-six. Present: Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge; Honorable FRANK H. RUDKIN, Circuit Judge.

No. 4631.

T. H. DEAL and UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, a Corporation,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Honorable William H. Hunt, Frank H. Rudkin and Wallace McCamant, Circuit Judges, before whom the cause was heard, ORDERED that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the Clerk, and that a Judgment

be filed and recorded in the minutes of this court in accordance with the opinion filed herein.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 4631.

T. H. DEAL and UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

OPINION U. S. CIRCUIT COURT OF APPEALS.

Error to the United States District Court of the Territory of Alaska, Fourth Division.

Before HUNT, RUDKIN and McCAMANT, Circuit Judges.

This is an action on a bond executed by plaintiffs in error, hereinafter referred to as the defendants. The bond was given to secure the faithful performance by the defendant Deal of his duties as postmaster at Fairbanks, Alaska. It is charged that the bond was breached by the loss of $9,900 stolen from a package of registered mail while in his custody. Judgment was entered on a verdict for plaintiff and defendants have sued out this writ of error.

McCAMANT, Circuit Judge.—It is contended that the complaint on which the case was tried fails to state facts sufficient to constitute a cause of action. It is alleged that the defendant Deal was postmaster at Fairbanks at the time in question; that the defendants executed to plaintiff a bond in the sum of $26,000 conditioned that the defendant Deal "should faithfully discharge all the faiths and trusts imposed on him as such postmaster either by laws or the regulations of the Post Office Department of the United States"; that on the 15th of September, 1921, the First National Bank of Fairbanks deposited in the postoffice at that place a parcel containing $9,937.65 belonging to the United States; that the parcel was addressed to the Special Disbursing Officer of the Alaska Engineering Commission at Healy, Alaska, by way of Nenana, and that it was duly stamped and registered; that while the parcel was in the custody of the defendant Deal it was opened and rifled of $9,900; that this loss was due to the negligence of the defendant Deal and his disregard of the postal laws and regulations; that said defendant "failed and neglected to use ordinary care in handling the said registered package, and failed and neglected to properly protect and safeguard the said registered package as registered mail matter, and failed and neglected to handle said registered package in the manner prescribed by law and the regulations of the Post Office Department, and handled the same in a careless and negligent manner, and in utter disregard of the law and the said regulations aforesaid, particularly of sec-

tions 361, 524, 940 and 1015 of the regulations of said Post Office Department promulgated in 1913; that by reason of the premises plaintiff sustained a loss of $9,900."

The complaint is not a model pleading and we think certain specifications of defendants' motion to make more definite should have been allowed, but it is conceded that the action of the lower court in this respect is not reviewable here. The breach of the bond is sufficiently alleged within the rule declared in 9 C. J. 101; Guy vs. McDaniel, 51 S. C. 436, 29 S. E. 196, 197; People ex rel. vs. Lee, 65 Mich. 557, 32 N. W. 817, 820.

The facts with reference to the care taken of the package were within the knowledge of the defendant Deal. "It is sufficient, in a declaration upon negligence, to specify the particular act, the commission or omission of which caused the injury, conjoining with it a general averment that it was negligently done, or omitted, and that it is unnecessary to go further, and particularize or point out the specific facts going to establish the negligence relied upon." Chaperon vs. Portland Electric Co., 41 Oregon, 39, 42. The complaint was not obnoxious to a general demurrer.

The defendants moved for a nonsuit and also for a directed verdict; error is assigned on the denial of these motions. The Government introduced evidence from which the jury was warranted in finding that on the 15th of September, 1921, the First National Bank of Fairbanks deposited at the Fairbanks postoffice a package containing $9,900 in cur-

rency and $37.65 in silver addressed to Frank Doner, Healy, via Nenana, Alaska; that the money was Government property and was sent to Doner, as disbursing agent for Alaska Engineering Commission; that the package was registered and believed by the clerk who received it to contain money; that it remained overnight in the Fairbanks postoffice and left early in the morning of Sept. 16 by rail for Nenana; that on leaving the postoffice it was contained in a locked mail sack which was still locked and intact when it reached Nenana. The sack was opened at Nenana and the condition of the package indicated that it had been tampered with; on investigation it developed that the currency had been removed and a magazine substituted. It appeared that the sack from which the currency was abstracted had been fastened with a nail and that other nails of the same type were found in the Fairbanks postoffice; also that there was a stack of magazines there from which the magazine in the mutilated package might have been taken. Section 361 of the Postal Regulations in force at the time contains the following language:

> "Where stamps and funds are kept in iron safes with 'combination locks,' such safes shall be carefully and completely locked at night or when the office is left without occupants. No credit will be allowed for losses from safes fastened only with what is termed a 'day lock' or 'day combination.'
>
> "A postmaster upon taking charge of his office shall immediately change the combination

on every safe therein; and where at any time a safe is procured, either new or second-hand, he shall immediately change the combination. Failure to make such change shall be considered as *prima facie* evidence of contributory negligence on the part of the postmaster in any case where claim is made for credit for money or other property stolen from such safes which have been opened without resort to violence."

It appeared that the defendant Deal had not conformed to the above requirements. He did not change the combination on the safe which was in use and on the night of Sept. 15, the safe was fastened only with a day lock. The package in question was in this safe during that night. Section 524 of the Regulations is as follows:

"Postmasters shall not permit any persons except duly sworn assistants, clerks, letter carriers, and postoffice inspectors or other authorized representatives of the department to have access to any mail matter in the postoffice. This prohibition extends especially to mail contractors and their drivers.

"Mails should not be made up or handled within reach of unauthorized persons, and such persons should be excluded from the room appropriated to the use of the postoffice while the mails are being opened or made up."

The evidence showed that the defendant Deal violated this section also. There was further evidence that other regulations were disregarded by

the postmaster at the time the package was in his custody.

The defendants challenge the sufficiency of the evidence on the ground that it does not appear that the rifling of the package resulted from the failure of the postmaster to conform to the regulations. We will assume without deciding that the evidence was insufficient to justify the jury in finding that the postmaster's failure to comply with the regulations proximately contributed to the loss of the currency.

The Government contends that the liability of the defendants is established by proof that the package contained money belonging to the United States and that this money was stolen while in the custody of the postmaster. It is contended that the case falls within the operation of Section 3846 R. S., Section 7208 Comp. St., which is as follows:

> "Postmasters shall keep safely, without loaning, using, depositing in an unauthorized bank, or exchanging for other funds, all the public money collected by them, or which may come into their possession, until it is ordered by the Postmaster-General to be transferred or paid out."

We are unable to agree with this contention. This statute has never been construed by any court as applicable to Government money contained in a sealed package sent through the mail. It was certainly not the intention of Congress that such money should be kept by a postmaster "until it is ordered by the Postmaster-General to be transferred

or paid out." We think the above section is applicable only to money which as such comes into the possession of the postmaster.

The Government also relies on Section 291 of the Regulations, which is in part as follows:

> "When a postoffice has been robbed, the postmaster shall immediately report all the facts to the Chief Inspector and to the postoffice inspector in charge of the division in which the postoffice is located. . . . . The report should give, if possible, all the circumstances connected with the robbery, the date, a detailed inventory of the loss, the denominations of stamped paper stolen, the amount of postal and money-order funds and of each class of Government property. The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the property."

This section is not mentioned in the complaint, nor was it offered in evidence. It is, however, a part of the Regulations published by the Department in 1913 and a copy of which was in the possession of the defendant Deal. Prior to 1912 there were a number of statutes authorizing postal regulations and by Act of Congress of August 24, 1912, a revised edition of the Regulations was authorized (37 Statutes, 541); the section above quoted is found in the edition so authorized. It is the duty of the courts to take judicial notice of these regulations. Caha vs. U. S., 152 U. S. 211, 222.

The above section charges the postmaster with responsibility for money stolen in a postoffice rob-

bery "if he fails to exercise due care in the protection of the property." The property referred to is the property stolen and the words "due care" are referable to the standard of care prescribed by other regulations. It is often difficult to determine whether negligence of the postmaster has contributed to a loss of mail stolen from a postoffice. The postal authorities have seen fit to charge the postmaster with absolute responsibility if he has neglected the care prescribed by the Regulations. The defendant Deal was chargeable with notice of this responsibility when he qualified as postmaster on the 19th of November, 1918. The condition of the bond executed by defendants was that "the said Thomas H. Deal shall faithfully discharge all duties and trusts imposed on him as postmaster either by law or by the regulations of the Post Office Department." One of the duties imposed upon him was to make good any loss by robbery if he should fail to exercise due care in the protection of the property stolen.

The defendants contend that the responsibility of postmasters in handling registered mail is determined by Section 940 of the Regulations which is as follows:

> "Postmasters and other postal employees will be held personally responsible by the Postoffice Department for the wrong delivery, depredation upon, or loss of any registered letter or parcel if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations."

There is no conflict between Sections 291 and 940. The latter defines the general responsibility of postmasters and the former their responsibility when postoffices are robbed. The general responsibility of a postmaster is that of a bailee charged with a high degree of care. U. S. vs. Rogde, 214 F. 283, 295. If his postoffice is robbed and he has failed to exercise due care of the stolen property he is responsible absolutely and it is not necessary for the Government to show that his want of care was the proximate cause of the loss.

The evidence warranted a finding by the jury that the parcel was rifled in the Fairbanks postoffice and that the defendant Deal in his care of the parcel had violated the regulations defining his duty with reference thereto. This was sufficient to take the case to the jury.

There are seventy-seven assignments of error. To notice them all in this opinion is impossible. We can only state the principles of law which control the determination of the case and pass on the assignments of error most insisted upon. The twenty-fourth instruction to the jury was as follows:

> "You are instructed that if you find and believe from a preponderance of the evidence in the case that a loss of $9,900.00 occurred to the plaintiff herein in the postoffice at Fairbanks, Alaska, and that the defendant Deal failed to fully lock the safe in which was contained the registered package in controversy during the night of September 15, 1921, and morning of

September 16, 1921, and that he did not use the full combination thereof for the purpose of locking it at said time, you should return a verdict for the plaintiff, otherwise your verdict should be for defendants."

This instruction was more favorable to the defendants than they were entitled to. For reasons already pointed out plaintiff was entitled to a verdict if the jury found the facts to be as stated in the instruction. The defendants, however, were not necessarily entitled to a verdict if the jury failed to find the facts to be as so stated.

Similar instructions were given with reference to the other respects in which the evidence tended to show that the defendant Deal had violated the regulations with reference to his care of the package. These instructions were more than fair to the defendants.

The twenty-second instruction was as follows:

"In this connection you are instructed that if you find and believe from a preponderance of all the evidence in the case that the defendant Deal knew that the registered package in controversy contained money, and that said money was the property of the United States, and that the said registered package was looted and rifled of $9,900.00 in currency while it was in his . . . . care and custody and control in the United States Postoffice at Fairbanks, and that when the said registered package was despatched from the said postoffice it had the bottom thereof torn open and fastened tem-

porarily with an eight-penny or ten-penny finishing nail, and the sum of $9,900.00 which it formerly contained had been abstracted and removed therefrom, and it then contained only $37.65 of the money which it had contained at the time it was delivered into the postoffice by the First National Bank, if you find from a preponderance of the evidence it was so delivered, and that at the time the said registered package left the said postoffice in the registry pouch it contained only $37.65 in silver, and a copy of the Popular Mechanics magazine, and a finishing nail holding the cut portions of the sack together, and that thereby the plaintiff herein sustained a loss of $9,900.00, and that the plaintiff has demanded from the defendants and each of them, the payment of said sum of $9,900.00, and that they, and each of them, have refused to pay the same, then I instruct you that you should return a verdict for the plaintiff; otherwise your verdict should be for the defendants."

This instruction contains no reference to the regulations whose violation was charged; it holds the postmaster liable as an insurer and directs a verdict for plaintiff in case the jury finds that the package was rifled while in the Fairbanks postoffice. The postmaster is not an insurer of the registered mail under his control. U. S. vs. Rogde, 214 F. 283. If there were any controversy about the postmaster's violation of the regulations, this instruction would require the reversal of the judgment.

The testimony with reference to these violations is uncontradicted and the violations are expressly admitted in defendants' brief. The instruction was therefore error without prejudice. Such error does not call for reversal. Section 1246, Comp. Statutes; 40 Statutes, 1181.

It was within the discretion of the trial court to admit evidence that there were in the Fairbanks postoffice nails and magazines similar to those used by the thief in repacking the rifled package. The Court did not err in permitting the witness Neil to read into the record extracts from the Regulations of 1913 and the Postal Guide of 1914, including regulations and instructions not mentioned in the complaint. These publications defined the duties of the postmaster, obedience to which was guaranteed by the bond.

The Court properly denied the motion of defendants to strike out the testimony of Evalyn Houck, the register clerk in the postoffice, that she believed the package contained money. This belief was material in determining the care that the package should receive. The defendant Deal was responsible for Miss Houck's acts and omissions. U. S. vs. Barker, 100 F. 34, 39.

It is unnecessary to prolong this opinion by reviewing the other errors assigned. We have examined them all. There are inaccuracies in the instructions, but we do not find that they prejudiced the defendants. The Court fairly submitted to the jury the question of whether the package was rifled in the Fairbanks postoffice. The verdict for

plaintiff concludes the defendants on this question. The concession that the regulations relevant to the care of this package were violated is all that is additionally required to spell the liability of the defendants.

There is a further controversy growing out of the settlement of the cost bill. Section 1462 of the Compiled Laws of Alaska is as follows:

> "A witness is not obliged to attend for oral examination or otherwise at a place distant more than one hundred miles from the place where he resides or at which he may be served with a subpoena; except that, in an action or proceeding pending in a court of record, the court or judge thereof, upon the affidavit of the party or someone on his behalf, showing that the testimony of the witness is material and his oral examination important and desirable, may indorse upon the subpoena an order for the attendance of the witness; the service of such subpoena and order and the payment of legal fees to the witness are sufficient to require his attendance, if he be served within the district."

Certain witnesses for plaintiff were subpoenaed at places within the District more than one hundred miles distant from the place of trial. No affidavit was filed as required by the above statute. Defendants contend that no mileage can be taxed in excess of 200 miles. The weight of authority in the federal courts supports the rule that mileage is recoverable only for such distance as is necessarily traveled by a witness from a place to which a subpoena will run.

U. S. vs. Southern Pacific, 172 F. 909; U. S. vs. Southern Pacific, 230 F. 270; Kirby vs. U. S., 273 F. 391. A subpoena will run to any point in the territory; the effect of Section 1462 *supra* is to relieve the witness from the burden of attending unless the subpoena is endorsed as provided therein. This section of the statute is doubtless taken from Section 818, Oregon Laws. The Oregon Statute has been construed by the supreme court of that state in Egan vs. Finney, 42 Oregon, 599, 606, and Kohlhagen vs. Cardwell, 93 Oregon, 610, 620–622. It is held that the adverse party is not entitled to complain of the failure to endorse on the subpoena an order requiring the attendance of the witness. If he attends he is entitled to his mileage and per diem. We think that this construction of the statute is correct and that defendants' exceptions to the mileage taxed were properly denied. The per diem is limited to the days the witnesses were in attendance at the place of trial. The per diem is not taxable for the time spent in coming and going. 15 C. J. 133. In this last respect defendants' exceptions are well taken.

James Hagan, a witness for plaintiff, was a deputy United States Marshal under salary. He traveled on a pass on the Government railroad in attending the trial. Under the rule announced in U. S. vs. Southern Pacific, 172 F. 909, 912, he was entitled to his necessary expenses in going to, returning from and attendance on the court. These expenses are taxable as costs. The witness fees of Hagan should be retaxed and the per diem of the

witnesses Keller, Fairborn, Doner, Bentley, Williams, Wrangstedt and Raeburn should be limited to the period of their attendance at the place of trial.

The judgment for costs is reversed with directions to retax in accordance with the above conclusions. In other respects the judgment is affirmed.

[Endorsed]: Opinion. Filed Feb. 15, 1926. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 4631.

T. H. DEAL and UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, a Corporation,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

JUDGMENT U. S. CIRCUIT COURT OF APPEALS.

In Error to the District Court of the United States for the Territory of Alaska, Fourth Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Territory of Alaska, Fourth Division, and was duly submitted.

On consideration whereof, it is now here ordered

and adjudged by this Court, that the judgment of the said District Court in this cause as to costs be and hereby is reversed, and that costs be retaxed in accordance with the opinion of this Court, and, in all other respects, the judgment of the said District Court be and hereby is affirmed.

[Endorsed]: Judgment. Filed and entered February 15, 1926. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1925, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-second day of March, in the year of our Lord one thousand nine hundred and twenty-six. Present: Honorable WILLIAM H. HUNT, Circuit Judge, Presiding; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 4631.

T. H. DEAL and UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, a Corporation,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration thereof, and by direction of the Honorable William H. Hunt, Frank H. Rudkin and Wallace McCamant, Circuit Judges, before whom the cause was heard, IT IS ORDERED that the petition, filed March 12, 1926, on behalf of the plaintiffs in error for a rehearing of the above-entitled cause be and hereby is denied.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 4631.

T. H. DEAL and U. S. FIDELITY & GUARANTY COMPANY OF BALTIMORE, MD.,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

ORDER STAYING ISSUANCE OF MANDATE, ETC.

Upon oral application of Geo. E. Stoker, Esq., counsel for the plaintiffs in error, and good cause therefor appearing, IT IS ORDERED that the issuance of the mandate under Rule 32 of this court in the above-entitled cause be, and hereby is stayed until the petition to be made on behalf of the plain-

tiffs in error to the Supreme Court of the United States for the issuance of a writ of certiorari herein be disposed of, on condition that the said petition be docketed in the Clerk's office of the said Supreme Court on or before April 26, 1926.

HUNT,
United States Circuit Judge.

Dated: San Francisco, California, March 25, 1926.

[Endorsed]: Filed Mar. 25, 1926. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

T. H. DEAL and UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, a Corporation,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 35 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, F. D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing five hundred and fifty-six (566) pages, numbered from and including 1 to and including 566, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled cause in the said Circuit Court of Appeals, made pursuant to request of counsel for the plaintiffs in error, and certified under Rule 35 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 30th day of March, A. D. 1926.

[Seal]

F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 24, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
APR 17 1926
WM. R. STANSBURY
CLERK

In the Supreme Court

OF THE

United States

MAY TERM, 1926.

No. 344

T. H. DEAL and UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND (a corporation),

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

LOUIS S. BEEDY,
California Commercial Union Building, San Francisco,
Attorney for Petitioners.

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In the Supreme Court
OF THE
United States

MAY TERM, 1926

No.

T. H. DEAL and UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND (a corporation),

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals For the Ninth Circuit.

To the Honorable William Howard Taft, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners herein, deeming themselves aggrieved by a decision of the Circuit Court of Appeals for the Ninth Circuit in a case in which they were plaintiffs in error and the United States of America

was defendant in error, respectfully petition your Honorable Court to grant a writ of certiorari for the review of said decision, and in that behalf respectfully show:

That in and by said decision said Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

The question involves the responsibility, as defined by the Postal Laws and Regulations, of a postmaster for the loss by theft of registered mail.

On September 15, 1921, petitioner T. H. Deal was postmaster at Fairbanks, Alaska, and petitioner United States Fidelity & Guaranty Company was surety on his official bond. On said day the First National Bank of Fairbanks registered at the Fairbanks office a package addressed to Frank Doner, special disbursing agent of the Alaska Engineering Commission, Healy, Alaska. As there was no post-office at Healy, the package was registered to Nenana. It contained $9,900.00 in currency and $37.65 in silver. The package remained in the Fairbanks office during the night of September 15, 1921, and was dispatched on the morning of the 16th, reaching Nenana in the afternoon of that day. Upon its arrival it was found to have been rifled, the currency removed, and an old magazine substituted.

Where the package was rifled, whether in the post-office at Fairbanks, or in the course of its transmission to Nenana, the Government was never able to discover; nor was it ever able to discover who was guilty of the theft.

More than a year and a half after the theft occurred a suit was commenced in the District Court of the Territory of Alaska, Fourth Division, by the United States of America as plaintiff against petitioners herein on the bond executed by them and given to secure the faithful performance by Deal of his duties as postmaster, to recover the amount stolen, namely, $9,900.00, with interest and costs.

The complaint alleged, among other things, that the theft occurred in the Fairbanks office and that the money stolen was property of the United States, but there was no allegation that the postmaster knew that the package contained money or that it was Government property, nor was any evidence adduced at the trial to prove that the postmaster had such knowledge.

The complaint further alleged that the package was opened and rifled due to the postmaster's negligence and disregard of the Postal Laws and Regulations, but no particular act of negligence was alleged as being the cause of the loss. Negligence as a conclusion was alleged, but no specific act having causal connection with the theft was alleged to have been negligently performed or omitted.

At the trial of the action the postmaster admitted that he failed to observe some of the postal regulations, but no evidence was adduced tending in the slightest degree to prove that the theft proximately resulted from any such omission or from any other act on his part.

The trial Court gave various instructions to the jury, similar in effect to the following (R. 403):

> "You are instructed that if you find and believe from a preponderance of the evidence in this case that a loss occurred to the plaintiff herein in the United States postoffice at Fairbanks, Alaska, either on the night of September 15, 1921, or in the morning of September 16, 1921, from the registered package in controversy in this action, and that during said time, or any part of said time, the defendant Deal permitted unauthorized persons to have access to the work-room of the postoffice where said registered package was then kept or stored, you should return a verdict for the plaintiff herein; otherwise your verdict should be for the defendants."

Exceptions were duly taken to this and other instructions of its kind on the ground, among others, that under it the jury were in effect directed to return a verdict for the plaintiff, if they found that the theft occurred in the Fairbanks office, even though there was no evidence that the act of the postmaster in permitting unauthorized persons to have access to his office was the proximate cause of the theft.

Verdict and judgment went for the plaintiff as prayed, and on writ of error to the Circuit Court of Appeals judgment was entered February 15, 1926, affirming the judgment of the Alaska District Court. (R. 554.)

Thereafter, on March 12, 1926, petitioners filed with said Circuit Court of Appeals a petition for rehearing. The same was denied March 22, 1926. (R. 555.)

By its decision the Circuit Court of Appeals holds that, by virtue of the provisions of Section 291 of the Postal Laws and Regulations, a postmaster is responsible for the loss by theft of registered mail if he has

failed to observe any of the regulations, even though it may not be shown that the loss proximately resulted from his negligence.

Said Section 291 is as follows:

> "When a postoffice has been robbed, the postmaster shall immediately report all the facts to the Chief Inspector and to the postoffice inspector in charge of the division in which the postoffice is located. (See Sec. 35.) The report should give, if possible, all the circumstances connected with the robbery, the date, a detailed inventory of the loss, the denominations of stamped paper stolen, the amount of postal and money-order funds and of each class of Government property. *The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the property.* If the loss includes the mail key the number should be given. (See Sec. 1527.) Full particulars regarding registered mail lost or rifled should be reported. The Chief Inspector shall promptly notify the Assistant Attorney General of every such casualty from which a claim for credit under the provisions of Section 150 may arise." (Italics added.)

Petitioners herein contend that the responsibility of a postmaster for the loss by theft of registered mail is defined, not by Section 291 of the Regulations, but by Section 940 thereof, and that unless it is shown that the loss was the proximate result of his negligence he cannot be held therefor.

Section 940 of the Regulations is as follows:

> "Postmasters and other postal employees will be held personally responsible by the Post Office Department for the wrong delivery, depredation upon, or loss of any registered letter or parcel, if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations."

In its decision the Circuit Court of Appeals says:

> "There is no conflict between Sections 291 and 940. The latter defines the general responsibility of postmasters and the former their responsibility when post offices are robbed. The general responsibility of a postmaster is that of a bailee charged with a high degree of care. U. S. v. Rogde, 214 F. 283, 295. If his post-office is robbed and he has failed to exercise due care of the stolen property he is responsible absolutely and it is not necessary for the government to show that his want of care was the proximate cause of the loss."

Petitioners herein contend that the responsibility declared by Section 291 applies only to the loss of Government property, when a postoffice has been robbed; and that the only responsibility or duty charged against the postmaster by said section, with reference to registered mail lost or rifled, is to report full particulars.

Petitioners submit that the responsibility of a postmaster for the loss by theft of registered mail is defined by Section 940, and not by Section 291, and that therefore the judgment of the Circuit Court of Appeals herein is erroneous and cannot be sustained, since by it petitioners are held liable for damages not necessarily occasioned by any act of the postmaster, whereas under Section 940 there can be no liability except where the loss by theft is the proximate result of his negligence.

Wherefore, and for the reasons set forth in their brief filed herewith, petitioners pray that a writ of certiorari be issued to the Circuit Court of Appeals for the Ninth Circuit commanding it to certify to this

Court for review a transcript of the proceedings in said cause, and that upon such review the judgment of said Court be reversed.

Dated, San Francisco,
April 16, 1926.

Respectfully submitted,
LOUIS S. BEEDY,
Attorney for Petitioners.

In the Supreme Court
OF THE
United States

MAY TERM, 1926

No.

T. H. DEAL and UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND (a corporation),
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

By the petition herein a writ of certiorari is sought to review the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of T. H. Deal and United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, plaintiffs in error, vs. United States of America, defendant in error. The

opinion of said Court has not yet been reported, but appears in the Record herein at pages 539-554.

GROUNDS OF THIS COURT'S JURISDICTION.

The judgment sought to be reviewed was rendered and entered February 15, 1926. (R. 554.)

By said decision the Circuit Court of Appeals has decided an important question of Federal law, to-wit, the responsibility of a postmaster, under the Postal Laws and Regulations, for the loss by theft of registered mail, a question which has not been, but should be, settled by this Court.

By said decision the Circuit Court of Appeals holds that the responsibility of a postmaster for such loss is defined by Section 291 of the regulations promulgated by the Postmaster General, not by Section 940 thereof, and that Section 291 makes a postmaster absolutely responsible for the loss if he has failed to observe any of the regulations, even though his omission of duty in no way contributed to the loss.

The question involved is one of great public importance. It vitally affects every postmaster in the land. If the decision of the Circuit Court of Appeals is correct, no person can afford to accept the office of postmaster while the present regulations remain in effect. A revision of the regulations could not be retroactive, consequently every postmaster in office now faces untold liabilities in no way the result of his lack of care. Justice to these holders of office, not alone to petitioners herein, demands that the question should

be considered and determined by this Court before the conclusion of the Circuit Court of Appeals becomes the settled definition of their responsibility.

Jurisdiction is invoked under Section 240 of the Judicial Code.

STATEMENT OF THE CASE.

The principal facts of the case are stated in the petition. On September 15, 1921, while petitioner Deal was postmaster at Fairbanks, Alaska, and petitioner Guaranty Company was his surety, a package containing $9900 in currency and $37.65 in silver was registered at his office. When it reached its destination the currency was gone and a magazine was in its place. The Government, claiming that the money stolen was public funds and that the theft occurred in the Fairbanks office, sued petitioners on their bond, charging that the postmaster was responsible for the loss because he failed to observe some of the Postal Regulations while the package was in his office, notwithstanding that there was no evidence that the theft proximately resulted from any omitted duty.

It was not alleged, nor was it claimed, nor was any evidence adduced to prove, that either the postmaster or any of his assistants or employees had any knowledge that the package was Government property. Indeed, no evidence was adduced to prove that either the postmaster or any of his subordinates had knowledge that the package contained money.

The action was brought in the District Court of the Territory of Alaska, Fourth Division, and was tried

to a jury. The postmaster admitted that he failed to observe some of the regulations. No evidence was adduced, however, that the theft proximately resulted from such neglect. The trial Court gave the following instructions, among others:

"You are instructed that if you find and believe from a preponderance of the evidence in the case that a loss of $9,900.00 occurred to the plaintiff herein in the postoffice at Fairbanks, Alaska, and that the defendant Deal failed to fully lock the safe in which was contained the registered package in controversy during the night of September 15, 1921, and morning of September 16, 1921, and that he did not use the full combination thereof for the purpose of locking it at said time, you should return a verdict for the plaintiff, otherwise your verdict should be for defendants." (R. 401-402.)

"You are instructed that if you find and believe from a preponderance of the evidence that a loss of $9,900.00 occurred to the plaintiff in the United States postoffice at Fairbanks, Alaska; and if you further find that at any time during the period that he was postmaster in said postoffice and prior to the 16th day of September, 1921, the defendant Deal failed to change the combination on the safe in which the registered package in controversy was stored during the night of September 15, 1921, and the morning of September 16, 1921, until it was despatched from the said postoffice, then you should find a verdict for the plaintiff, otherwise your verdict should be for the defendants." (R. 403.)

"You are instructed that if you find and believe from a preponderance of the evidence in this case that a loss occurred to the plaintiff herein in the United States postoffice at Fairbanks, Alaska, either on the night of September 15, 1921, or in the morning of September 16, 1921, from the

registered package in controversy in this action, and that during said time, or any part of said time, the defendant Deal permitted unauthorized persons to have access to the work-room of the postoffice where said registered package was then kept or stored, you should return a verdict for the plaintiff herein; otherwise your verdict should be for the defendants." (R. 403.)

Defendants objected to these instructions, and each of them, on various grounds, particularly on the ground that they charged defendants with liability for the theft regardless of the question of proximate cause.

Verdict and judgment were for the plaintiff. On writ of error to the Circuit Court of Appeals said judgment was affirmed on the ground that by virtue of the provisions of Section 291 of the Postal Laws and Regulations the postmaster was responsible for the loss even though it was not the proximate result of his failure to comply with the regulations.

ASSIGNMENTS OF ERROR.

Petitioners rely upon all assignments of error set out in the Record, but especially No. 30 (R. 470-471), No. 31 (R. 471) and No. 32 (R. 471-472), assigning error on the part of the trial Court in giving to the jury, over objections, the instructions above quoted.

ARGUMENT.

In affirming the judgment of the trial Court the Circuit Court of Appeals holds that inasmuch as the

verdict for plaintiff was necessarily a finding that the theft occurred in the Fairbanks office, it was sufficient to spell the liability of the defendants that the postmaster admitted failing to observe some of the postal regulations, in view of the provisions of Section 291, which section, and not Section 940, the Court holds, defines the responsibility of a postmaster when his office has been robbed.

Section 291 will be found on page 141 of the "Postal Laws and Regulations", 1913 Edition, and is as follows:

> "When a post office has been robbed, the postmaster shall immediately report all the facts to the Chief Inspector and to the post-office inspector in charge of the division in which the post office is located. (See sec. 35.) The report should give, if possible, all the circumstances connected with the robbery, the date, a detailed inventory of the loss, the denominations of stamped paper stolen, the amount of postal and money-order funds and of each class of Government property. The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the property. If the loss includes the mail key the number should be given. (See sec. 1527.) Full particulars regarding registered mail lost or rifled should be reported. The Chief Inspector shall promptly notify the Assistant Attorney General of every such casualty from which a claim for credit under the provisions of section 150 may arise."

Section 940 will be found on page 468 of said compilation, and is as follows:

> "Postmasters and other postal employees will be held personally responsible by the Post Office Department for the wrong delivery, depredation upon, or loss of any registered letter or parcel if

such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations."

In its decision the Circuit Court of Appeals says (R. 547):

> "There is no conflict between Sections 291 and 940. The latter defines the general responsibility of postmasters and the former their responsibility when postoffices are robbed. The general responsibility of a postmaster is that of a bailee charged with a high degree of care. U. S. vs. Rogde, 214 F. 283, 295. If his postoffice is robbed and he has failed to exercise due care of the stolen property he is responsible absolutely and it is not necessary for the Government to show that his want of care was the proximate cause of the loss."

Whether Section 291 or Section 940 defines the responsibility of postmasters when registered mail has been stolen is the fundamental question presented by this petition, and it is the contention of petitioners that the Circuit Court of Appeals is in error in holding that the provisions of Section 291 are controlling in such a case.

SECTION 940, NOT SECTION 291, DEFINES RESPONSIBILITY WHEN REGISTERED MAIL IS STOLEN.

We submit that the Circuit Court of Appeals is in error when it says that Section 940 "defines the general responsibility of postmasters" and Section 291 "their responsibility when post offices are robbed". We submit that the Court has given neither section its true significance. We submit that Section 291 defines the responsibility of postmasters for *Govern-*

ment property stolen, and that Section 940 defines their responsibility for *registered mail* stolen.

STRUCTURE OF REGULATIONS PROVES OUR CONTENTION.

Section 291 is a part of Subdivision V, of Chapter 3, of Title Three of the Postal Laws and Regulations. The subject of Title Three is "Post Offices". Chapter 3 thereof is entitled "General Provisions Relating to Post Offices". Subdivision V of Chapter 3, in which Section 291 is found, is entitled "Miscellaneous Provisions".

Section 940 is a part of Subdivision V, of Chapter 1, of Title Six of the Postal Laws and Regulations. The subject of Title Six is "Registry System". Chapter 1 thereof is entitled "Registration of Domestic Mail Matter". Subdivision V of Chapter 1, in which Section 940 is found, is entitled "Treatment of Registered Matter at Offices of Delivery".

It is at once apparent that Title Three, which includes Section 291, covers *general* provisions, and that Title Six, which includes Section 940, covers *particular* provisions,—provisions relating exclusively to the registry system. The very structure of the Regulations challenges the conclusion of the Circuit Court of Appeals that Section 940 defines the general responsibility of postmasters and Section 291 their responsibility when post offices are robbed. We submit that the structure of the Regulations compels a conclusion directly to the contrary of that reached by the Court.

SECTION 291 APPLIES TO GOVERNMENT PROPERTY ONLY.

Considering Section 291, standing alone and unaffected by the structure of the Regulations, we submit that the responsibility of a postmaster thereby defined is confined to *Government property* stolen. By its terms it requires him, when his office has been robbed, to make an immediate report to the inspector in charge, giving, if possible,

> "all circumstances connected with the robbery, the date, a detailed inventory of the loss, the denominations of stamped paper stolen, the amount of postal and money-order funds and of each class of government property."

Immediately following these directions comes the provision that "the postmaster shall be held *responsible for the loss*", etc. The loss referred to must necessarily be the property previously mentioned,—*all Government property*. Registered mail is not included. It is later in the section that registered mail is mentioned, and then in the following language:

> "Full particulars regarding registered mail lost or rifled should be reported."

The only duty or responsibility imposed upon the postmaster by this section of the regulations with reference to registered mail lost or stolen is to report full particulars thereof. If it had been intended to make the postmaster responsible for registered mail as for stamped paper and other Government property, we submit that registered mail would have been mentioned and included with the Government property referred to and have preceded the definition of the scope of the postmaster's responsibility. We submit

that it is perfectly clear that the section was drafted with a design that the high degree of responsibility thereby created should apply only to Government property.

We submit that the form in which Section 291 is cast discloses a clear intent to omit all reference to the postmaster's responsibility for loss or theft of registered mail, and the reason why the section is so cast lies in the fact that his responsibility in that particular is elsewhere defined, namely, in Section 940.

SECTION 940 APPLIES TO REGISTERED MAIL STOLEN.

Turning now to Section 940, and considering it standing alone and unaffected by the structure of the Regulations, we submit that it defines in unmistakable terms the responsibility of postmasters for registered mail stolen. We submit that there is nothing in the frame of the section which justifies the conclusion of the Circuit Court of Appeals that it defines the general responsibility of postmasters. It very definitely declares that they will be held responsible if wrong delivery, depredation or loss "of any registered letter or parcel" be due to their "negligence or disregard of the regulations". This is not a declaration of general responsibility. It is a declaration of specific responsibility, a responsibility conditioned upon the absence of due care, a responsibility that does not attach unless it is made to appear that if an omitted duty had been performed no wrong delivery, depreda-

tion or loss would have occurred, and a responsibility confined to a "registered letter or parcel".

Furthermore, the word "depredation" comprehends burglary, theft or robbery. One definition of the word "depredate", given by all authorities, is "to rob or pillage". In the case before us we have a definite instance of depredation. The package was broken open and a magazine substituted for the currency. If consequence is to be attributed to words, the case presented is not one of robbery at all, but purely one of depredation or theft. Robbery implies violence or threats of injury. No violence, no threat of injury, was resorted to in the case before us. That much, at any rate, we know.

It is clear, therefore, that to reach the conclusion that the responsibility of the postmaster was defined by Section 291 instead of by Section 940, the Circuit Court of Appeals was compelled to give to the word "depredation" found in Section 940 a literal or technical significance, a meaning not sufficiently comprehensive to cover a theft perpetrated as this one was, and to give to the word "robbery" found in Section 291 a liberal or general significance, a meaning sufficiently comprehensive to cover ordinary theft. We submit that the Court was not justified in resorting to such an extremity. If it was compelled to give literal effect to Section 940, it was not at liberty to give general effect to Section 291. Justice cannot be the issue of such inconsistency.

While the regulations of the Post Office Department have the force of law, it is not to be supposed

that they were drafted with the same refinement of definition as are criminal statutes. We maintain that the regulations should be construed or interpreted liberally so as to give effect to their intent or purpose. That it was the intent that Section 940, and not Section 291, should define the responsibility of postmasters for the theft of registered mail admits of no doubt. That this is so is obvious, not only from the language of the respective sections, but from the structure of the regulations as a whole, and from the fact that Section 940 is a part of Title Six relating to the registry system; and such being the obvious intent, we submit that it was the duty of the Court, under fundamental principles of statutory construction, to so construe other sections of the regulations, if it could be reasonably done, as not to nullify that intent. Section 940 ceases to be of any consequence, in instances of depredations, if the decision of the Circuit Court of Appeals is correct. Section 291 should be construed in such a way as to uphold and not nullify Section 940, and it is clearly susceptible of such a construction. Indeed, as we have pointed out, it is a manifestly unwarranted construction of Section 291 to make it applicable in any respect whatever to the responsibility of postmasters for the theft of registered mail.

SAVING CLAUSE OF SECTION 291 INAPPLICABLE TO REGISTERED MAIL.

On the proposition under discussion it is to be observed that if Section 291 defines the responsibility

of postmasters for the theft of registered mail, a more onerous responsibility is cast upon them therefor than for the theft of Government property. Section 291 contains a saving clause, applicable to Government property stolen but impossible of application to registered mail stolen. Said clause reads:

> "The Chief Inspector shall promptly notify the Assistant Attorney General of every such casualty from which a claim for credit under the provisions of section 150 may arise."

Section 150 of the Regulations is Chapter 231 of the Act of May 9, 1888 (25 Stat. 135), as amended by Chapter 424 of the Act of June 11, 1896 (29 Stat. 458). It is as follows:

> "The Postmaster General * * * is hereby authorized to investigate all claims of postmasters for the loss of money-order funds, postal funds, postage stamps, stamped envelopes, newspaper wrappers, and postal cards, belonging to the United States in the hands of such postmasters, resulting from burglary, fire, or other unavoidable casualty, and if he shall determine that such loss resulted from no fault or negligence on the part of such postmasters, to pay to such postmasters, or credit them with the amount so ascertained to have been lost or destroyed, and also to credit postmasters with the amount of any remittance of money-order funds or postal funds made by them in compliance with the instructions of the Postmaster General, which shall have been lost or stolen while in transit by mail from the office of the remitting postmaster to the office designated as his depository, or after arrival at such depository office and before the postmaster at such depository office has become responsible therefor: *Provided,* That no claim exceeding the sum of ten thousand dollars shall be paid or credited until after the facts shall have been

ascertained by the Postmaster General and reported to Congress, together with his recommendation thereon, and an appropriation made therefor: *And provided further,* * * * that no claim for losses * * * shall be allowed unless presented within six months from the time the loss occurred.

2. It is hereby made the duty of the Postmaster General to report his action herein to Congress annually, with his reasons therefor in each particular case."

Provision is thus made to relieve a postmaster from the consequences of the responsibility imposed by Section 291 for loss by theft where the loss is not the result of his negligence, *but the relief is confined to Government property stolen.* No provision is made for relief when registered mail is stolen. For the theft of registered mail, whether due to his negligence or not, Section 291, if it applies, casts the postmaster with a responsibility limited only by the value of the thing stolen, and from which he cannot be relieved, if he has failed to observe any of the regulations, and this despite the fact that the liability of the Government is limited to $100.00.

A postmaster knows what Government property is in his care and he knows its value. As to such property he knows the extent of his liability. But he has no means of knowing the value of registered mail entrusted to his care, unless the person registering it voluntarily declares its value. He cannot compel a declaration. He is obliged to accept the parcel and, should it be stolen while in his care, obliged to make good its full value, if he has failed to fully observe

the regulations, even though his neglect in no way contributed to the theft.

It thus appears, if the decision of the Circuit Court of Appeals is correct, that a more onerous responsibility is cast upon postmasters for the loss by theft of registered mail than for the loss by theft of Government property, and a more onerous responsibility for registered mail than the Government itself assumes. It is inconceivable that the postal regulations were drafted with such a design, and we submit that they are not reasonably susceptible of such a construction.

In the case of *United States v. Rogde*, 214 F. 283, 294, Judge Elliott says, after quoting Section 150 of the Regulations last hereinabove quoted:

> "By an act approved January 21, 1914, the indemnity above provided for was extended to include postal savings funds, postal savings cards, postal savings stamps, postal savings certificates, key deposit funds, funds deposited to cover postage on mailing, and funds deposited to cover orders for stamped envelopes. Congress by the statutes has expressly provided for the relief of postmasters from the absolute liability that is imposed upon them by statute for the property that belongs to the government of the United States. The very fact that these statutes have never been extended to cover ordinary mail matter or registered mail is persuasive at least that such extraordinary liability with respect to mail matter was never contemplated and that the interpretation given the statutes and regulations by Congress was that there existed no such liability without negligence."

For the foregoing reasons we respectfully submit that the responsibility defined by Section 291 applies

to Government property alone, and that Section 940 defines the responsibility of postmasters as to registered mail.

In conclusion we would point out that the proposition for which we contend is not affected by the circumstance that the money stolen was Government property. The decision of the Circuit Court of Appeals is not grounded upon that circumstance. To the contrary, that Court expressly holds that "Government money contained in a sealed package sent through the mail" is not "money which as such comes into the possession of the postmaster". (R. 544-545.) But even if it were otherwise it would be of no consequence in this case, for the reason that it was not alleged in the complaint, nor did the Government claim, that either the postmaster or any of his assistants or employees had any knowledge that the package was Government property. A postmaster assumes a high degree of responsibility for Government property coming into his possession, but it would be manifestly unjust, and wholly unsupportable, to charge him with such responsibility for property which he did not know belonged to the Government.

For the reasons stated it is respectfully submitted that the writ of certiorari prayed for should be issued and that the judgment of the Circuit Court of Appeals should be reversed.

Dated, San Francisco,
April 16, 1926.

LOUIS S. BEEDY,
Attorney for Petitioners.

[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 344

T. H. DEAL and UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, Petitioners,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 11 F. (2d) 3. It appears in the Record herein at pages 539-553.

Certiorari was granted by this court May 24, 1926. (271 U. S. 656; 46 Sup. Ct. Rep. 630; 70 L. Ed. 1135.)

The charge of the District Court to the jury appears in the Record herein at pages 373-406.

JURISDICTION.

The judgment under review was entered by the Circuit Court of Appeals on February 15, 1926 (R. 553), affirming a judgment of the District Court for the Territory of Alaska, Fourth Judicial Division, in conformity with the verdict of a jury, in favor of the United States of America and against petitioners. The jurisdiction of this court to issue a writ of certiorari and review the judgment is found in Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936.

STATEMENT OF THE CASE.

During the year 1921 the petitioner T. H. Deal was postmaster at Fairbanks, Alaska. The United States Fidelity & Guaranty Company, the other petitioner herein, was surety on the postmaster's bond. On the afternoon of September 15, 1921, the First National Bank of Fairbanks, Alaska, registered a package at the Fairbanks postoffice, addressed to Frank Doner, special disbursing agent of the Alaska Engineering Commission at Healy, Alaska. As there was no postoffice at Healy, the package was registered to Nenana. According to the testimony of the officers of the bank who made up the package, it contained $9900.00 in currency and $37.65 in silver. The bank messenger who presented the parcel for registration did not declare its contents. The register clerk who registered it did not know what it contained. She thought it was

money, but was not sure. (R. 54.) The dispatching clerk placed the parcel, with another registered package, in a paper jacket provided for such purpose, wrapped some twine around it, and placed it in the safe, where it remained until the morning of September 16th. The safe was left on the day combination. On the morning of the 16th the dispatching clerk took the package from the safe and deposited it in the Nenana pouch. It then appeared to her to be in the same condition as when she placed it in the safe the evening before. (R. 73.) The pouch was locked by the postmaster. The lock on the pouch was ordinary iron, to which every postoffice and every railway mail clerk has a key. (R. 74.) Wetzler, Postoffice Inspector, testified that the lock could be picked with a piece of steel wire without much difficulty. (R. 222.)

The adopted method of carrying the mail from the Fairbanks postoffice to the railroad warehouse was by an express wagon driven by one Lillico. The mail, including the pouch referred to, was so carried on the morning of September 16th and was delivered by Lillico to Keller, in charge of the warehouse. Keller was freight clerk of the Alaska Engineering Commission and was not an employe in the postal service. (R. 91.) He handed the sacks to Nordby, brakeman, who placed the same in the freight car provided for the purpose. This car was then switched to the other side of the warehouse, where the train was being made up, and it stood there about an hour. (R. 94.) So far as the evidence disclosed, the mail remained entirely unguarded

during this hour. The sliding doors to the car carried no locks and were held in place only by a hook on the outside.

The mail was carried on September 16th, as on other days, from Fairbanks to Nenana in this box car. It was the method and means provided by the Government. No sworn employe of the postal service was in charge. The mail received only such oversight as the freight received, namely, the conductor and brakemen were supposed to see that the doors were kept hooked while the train was in motion and that no person other than one of the train crew should enter the car. While the train was in motion the head brakeman was supposed to ride on the locomotive and the rear brakeman in the passenger coach at the end of the train. There was no evidence as to where the brakemen rode on this particular day, but the evidence showed that a number of stops were made en route and that freight was unloaded from the car in which the mail was carried. The mail pouches were in plain view, on top of the freight at one end of the car.

The trip from Fairbanks to Nenana ordinarily consumed three hours, but on this particular day it took much longer. During the trip a fire broke out in a gondola car loaded with wood. This car was next to the locomotive. The freight car containing the mail was immediately behind the car of wood. Then came another freight car, with one or two passenger coaches at the rear. The fire caused much excitement. Every member of the train crew, together with the passengers, were engaged in extin-

guishing it, and more than half an hour was required to do so. A great deal of smoke surrounded the train.

Late in the afternoon of that day the mail reached the Nenana postoffice, and the registered package in question was delivered by the Nenana postmaster to the agent of the addressee. The package was opened in the presence of the Nenana postmaster and was found to contain an old magazine and $37.65 in silver, but no currency.

Where the package was rifled, whether in the postoffice at Fairbanks, or in the course of transmission to Nenana, the Government was never able to discover; nor was it ever able to discover who was guilty of the theft. Not being able to otherwise account for the loss, the Government commenced this suit, over a year and a half after the loss occurred, against Deal and his surety for damages in the sum of $9,900.00, with interest and costs, upon the theory that the theft occurred through some negligence of the postmaster, although the Government had absolutely no evidence that the theft occurred in the Fairbanks office or that it proximately resulted from any negligence on the part of the postmaster. The second amended complaint alleges that the package was opened and rifled due to the postmaster's negligence and disregard of the postal laws and regulations. (R. 6.) It is further alleged that prior to and at the time of said loss the postmaster neglected to perform his duty with respect to the registered package as imposed upon him by law and the regulations of the

Postoffice Department, particularly Sections 361, 524, 940 and 1015 of the Regulations of 1913; that he failed to use ordinary care in the handling of the package, and failed to properly protect and safeguard it. (R. 6.)

Motions were made by both defendants to require plaintiff to make said complaint more definite and certain as to what particular acts of negligence of the postmaster were the cause of the depredation upon the package, what laws or regulations he violated, the violation of which caused the loss, and in what respect he failed to exercise ordinary care with reference to the package, and in what way he neglected to protect and safeguard it. (R. 16-21.) These motions were denied. (R. 21.)

Demurrers to the complaint were interposed on the ground that no cause of action was stated and that the facts alleged did not show that the postmaster was liable in any way for the alleged damage suffered by the plaintiff. (R. 22-23.) These demurrers were overruled. (R. 24.)

Defendants answered, denying all material allegations of the complaint. (R. 25-30.) Trial was had to a jury, and on February 20, 1925, a verdict was returned in favor of the plaintiff and against both defendants for the sum of $9,900.00, with interest thereon at the rate of 8% per annum from September 16, 1921. (R. 418.) Motions were filed for a new trial and overruled, and under date of March 3, 1925, judgment in conformity with the verdict was given and entered. (R. 427.)

Thereafter plaintiff filed a cost bill in the sum of $3,098.45. (R. 428-431.) Exceptions and objections thereto were interposed by the defendants. (R. 432-436.) The clerk taxed the costs as rendered. (R. 437.) Defendants appealed to the trial court and petitioned the court to retax the costs, and the matter was presented upon an agreed statement of facts. (R. 437-445.) On May 4, 1925, the court retaxed the costs in the sum of $3,036.25. (R. 445-446.) Exceptions were duly taken to this order and to the refusal of the court to retax in accordance with the defendants' petition. (R. 446-449.)

Thereafter and in due time a writ of error was allowed to have the aforesaid judgment and order reviewed by the Circuit Court of Appeals for the Ninth Circuit. (R. 515.)

ASSIGNMENTS OF ERROR.

Petitioners rely upon the following assignments of error:

(1) The court erred in overruling defendants' motion to require plaintiff to make its second amended complaint more definite and certain, by alleging definitely what alleged acts of negligence were relied upon by plaintiff as occasioning the loss alleged to have been suffered by plaintiff.

(2) The court erred in overruling the separate demurrers of the defendants to plaintiff's second amended complaint.

(3) The court erred in overruling the defendants' motion for a nonsuit at the conclusion of plaintiff's case.

(4) The court erred in overruling defendants' motion for a nonsuit after the close of all the evidence and before the matter was submitted to the jury.

(25) The court erred in giving to the jury its instruction No. 17, which was as follows:

> "You are instructed that it is claimed by the plaintiff in this case that the defendant Deal knew that the registered package in controversy contained money belonging to the plaintiff herein, or that all the circumstances as disclosed by all the evidence in the case were sufficient to charge him with knowledge that said registered package in controversy contained money, the property of the plaintiff herein; and if you find and believe from a preponderance of the evidence in this case that, when the said registered package was received into the United States postoffice at Fairbanks, Alaska, it was so received from the First National Bank of Fairbanks, Alaska, addressed to Frank T. Doner, Special Disbursing Agent of the Alaska Engineering Commission, at Healy, Alaska, via Nenana, Alaska, and that such package was an ordinary canvas or cloth sack, sealed at the top and heavy at one end, and that the person receiving it at the postoffice for registry had reason to believe, and did believe, that it contained money, taking all the circumstances as disclosed by the evidence into consideration, and that the defendant Deal was present and assisting in despatching the said package when contained in a paper jacket ordinarily used for enclosing registered packages, then I instruct you as a matter of law that the

belief of the employee who received the said package into the postoffice as to the contents thereof is imputed by the law to the defendant Deal himself, and you, as jurors, would be warranted in assuming and believing that, under the circumstances of the case, he also believed the said registered package to contain money, and that said money was the property of plaintiff herein."

(26) The court erred in giving to the jury its instruction No. 19, which was as follows:

"You are instructed that one of the conditions and obligations imposed upon the defendant Deal by his acceptance of the office of postmaster of the United States postoffice at Fairbanks under the terms and conditions of the bond, which it is admitted he executed as principal and the defendant United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, executed as surety, is to the effect that the defendant Deal shall faithfully discharge all duties and trusts imposed upon him as postmaster, either by law or by the regulations of the Postoffice Department; and if you find and believe from a fair preponderance of the evidence in this case that the duties and trusts imposed upon the defendant Deal as postmaster, either by law or by the regulations of the Postoffice Department, required that, as such postmaster, before he should ship any registered package out of his office and on its way to its destination that he should enclose the same in a sealed jacket, and that, with reference to the registered package in controversy in this action, he failed to do so, and that the said package, while in his care and custody, was rifled, and any money, the property of the United States, removed therefrom, then and in that event the defendant Deal and the surety upon his official bond would be responsible for

the loss occasioned by such removal, and in that event you should find a verdict for the plaintiff for an amount equal to the amount of money which you find to have been removed from said registered package."

(27) The court erred in giving to the jury its instruction No. 21, which was as follows:

"You are further instructed that, if you find and believe, from a preponderance of the evidence, that the registered package in controversy in this action was not placed in a sealed jacket and the contents thereof witnessed, as required by the postal laws and regulations, by the defendant Deal personally, but that the same was done by the stamp clerk, who had been employed by the said Deal as postmaster, only a month before, and that she had not theretofore received any instructions from the said defendant Deal as postmaster, or from anybody in his behalf and under his supervision, with reference to the rules laid down by the United States postal laws and regulations concerning the handling, caring for, guarding and despatching of registered packages, and that the defendant Deal failed in his duty in supervising the method employed by the said stamp clerk in so handling, caring for, guarding and despatching said registered package in controversy, then I instruct you that the violation and disregard of the United States postal laws and regulations by the said stamp clerk is by the law imputed to the defendant Deal personally; and if you further find from a preponderance of the evidence that a loss occurred to the plaintiff in the sum of $9,900.00, and that said loss occurred in the United States postoffice at Fairbanks, Alaska, and not elsewhere, under the above-mentioned conditions, you should find a verdict for the plaintiff; otherwise your verdict should be for the defendants."

(28) The court erred in giving to the jury its instruction No. 22, which was as follows:

"You are instructed that the official oath of the defendant Deal as postmaster, among other things, contains the following provision: 'And that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control: So help me God.' In this connection you are instructed that, if you find and believe from a preponderance of all the evidence in the case, that the defendant Deal knew that the registered package in controversy contained money, and that said money was the property of the United States, and that the said registered package was looted and rifled of $9,900.00 in currency while it was in his care and custody and control in the United States postoffice at Fairbanks, and that, when the said registered package was despatched from the said postoffice, it had the bottom thereof torn open and fastened temporarily with an eight-penny or a ten-penny finishing nail, and the sum of $9,900.00 which it formerly contained had been abstracted and removed therefrom, and it then contained only $37.65 of the money which it had contained at the time it was delivered into the Postoffice by the First National Bank, if you find from a preponderance of the evidence it was so delivered, and that at the time the said registered package left the said postoffice in the registry pouch it contained only $37.65 in silver, and a copy of the Popular Mechanics magazine, and a finishing nail holding the cut portions of the sack together, and that thereby the plaintiff herein sustained a loss of $9,900.00, and that the plaintiff has demanded from the defendants, and each of them, the payment of said sum of $9,900.00, and that they, and each of them, have refused to pay the same, then I instruct you that you

should return a verdict for the plaintiff; otherwise your verdict should be for the defendants."

(30) The court erred in giving to the jury its instruction No. 24, which was as follows:

"You are instructed that if you find and believe from a preponderance of the evidence in the case that a loss of $9,900.00 occurred to the plaintiff herein in the postoffice at Fairbanks, Alaska, and that the defendant Deal failed to fully lock the safe in which was contained the registered package in controversy during the night of September 15, 1921, and morning of September 16, 1921, and that he did not use the full combination thereof for the purpose of locking it at said time, you should return a verdict for the plaintiff; otherwise your verdict should be for defendants."

(31) The court erred in giving to the jury its instruction No. 26, which was as follows:

"You are instructed that if you find and believe from a preponderance of the evidence that a loss of $9,900.00 occurred to the plaintiff in the United States postoffice at Fairbanks, Alaska; and if you further find that at any time during the period that he was postmaster in said postoffice and prior to the 16th day of September, 1921, the defendant Deal failed to change the combination on the safe in which the registered package in controversy was stored during the night of September 15, 1921, and the morning of September 16, 1921, until it was despatched from the said postoffice, then you should find a verdict for the plaintiff; otherwise your verdict should be for the defendants."

(32) The court erred in giving to the jury its instruction No. 27, which was as follows:

"You are instructed that if you find and believe from a preponderance of the evidence in this case that a loss occurred to the plaintiff herein in the United States postoffice at Fairbanks, Alaska, either on the night of September 15, 1921, or in the morning of September 16, 1921, from the registered package in controversy in this action, and that during said time, or any part of said time, the defendant Deal permitted unauthorized persons to have access to the work-room of the postoffice where said registered package was then kept or stored, you should return a verdict for the plaintiff herein, otherwise your verdict should be for the defendants."

(51) The court erred in permitting the witness G. Wetzler, over defendants' objections, to testify as follows:

"Q. Mr. Wetzler, state whether or not you found a large stack of magazines in the postoffice at Fairbanks, Alaska.
A. Yes, sir."

(57) The court erred in permitting the witness J. E. Fitzgerald, over defendants' objections, to testify as follows:

"Q. Did you, at that time, make a search in the postoffice for finishing nails similar to the one that Mr. Wetzler turned over to you?
A. I made a search, yes, sir.
Q. What did you find?
A. I found several finishing nails, the same kind as the one stuck in the sack."

(74) The court erred in refusing to re-tax the costs allowed to A. H. Keller, L. A. Fairborn, Frank Doner, George Bentley, Mrs. E. A. Williams, P. O. Wrangstedt, and W. B. Raeburn, and in allowing

them full amount of mileage and per diem set forth in the cost bill, and in refusing to re-tax said costs and allow each of said witnesses mileage for but two hundred miles and per diem for the time actually consumed in traveling one hundred miles to Fairbanks and one hundred miles from Fairbanks, and for the days they were actually in attendance on said court in the trial of said cause, and in allowing said witnesses the full amount of mileage set forth in said cost bill and per diem for the full number of days set forth therein.

(75) The court erred in allowing any witness fees or mileage to the witness James Hagan, a deputy United States marshal.

(76) The court erred in sustaining the clerk's taxation of the costs respecting the witnesses A. H. Keller, L. A. Fairborn, Frank Doner, George Bentley, Mrs. E. A. Williams, P. O. Wrangstedt, W. B. Raeburn and James Hagan.

ARGUMENT.

I.

THE CHARGE TO THE JURY, PRESENTING THREE INCONSISTENT THEORIES UPON WHICH THE POSTMASTER COULD BE HELD LIABLE, WAS FATAL ERROR UNLESS, BECAUSE OF SOME PROVISION OF THE POSTAL LAWS OR REGULATIONS, THE POSTMASTER WAS CHARGED WITH RESPONSIBILITY FOR THE LOSS (1) IF, WHILE THE PACKAGE WAS IN HIS POSSESSION, HE FAILED TO OBSERVE ANY REGULATION RELEVANT TO ITS CARE, IRRESPECTIVE OF WHETHER HIS NEGLIGENCE PROXIMATELY RESULTED IN THE LOSS, OR (2) IF HE KNEW THAT THE PACKAGE CONTAINED MONEY BELONGING TO THE UNITED STATES. PETITIONERS CONTEND (1) THAT A POSTMASTER'S RESPONSIBILITY FOR THE LOSS OF REGISTERED MAIL IS DEFINED BY SECTION 940 OF THE REGULATIONS, WHICH CONDITIONS HIS LIABILITY UPON NEGLIGENCE HAVING CAUSAL CONNECTON WTH THE LOSS, AND THAT SECTION 291 OF THE REGULATIONS HAS NO APPLICATION; AND (2) THAT A POSTMASTER IS NOT CHARGED WITH THE RESPONSIBILITY OF AN INSURER OF REGISTERED MAIL CONTAINING MONEY OF THE UNITED STATES, IRRESPECTIVE OF WHETHER OR NOT HE HAS KNOWLEDGE OF WHAT THE PACKAGE CONTAINS.

By the instructions which are assigned as error under assignments numbered 26, 27, 30, 31 and 32, the trial court directed the jury to return a verdict in favor of the plaintiff if they found that the loss occurred in the Fairbanks office and also found that

the postmaster failed to observe certain of the postal regulations, such as not changing the combination on the safe, not fully locking the safe, permitting unauthorized persons to have access to the room where the package was stored, etc. The element of proximate cause was omitted from these instructions. Therefore, since it was conceded by the postmaster that he did not observe some of these regulations, the jury were obliged by these instructions to return a verdict for the plaintiff if they found that the loss occurred in the Fairbanks office.

By the 22nd instruction (assignment of error numbered 28), the trial court directed the jury to return a verdict for the plaintiff if they found that the loss occurred in the Fairbanks office and also found that the postmaster knew that the package contained money belonging to the United States. Under this instruction the jury were obliged to return a verdict for the plaintiff, even though the postmaster performed every duty imposed upon him, if they found that he knew what the package contained and also found that the theft occurred while the package was in his care.

Notwithstanding the foregoing instructions, unconditionally and unequivocally charging the jury to find for the plaintiff under definite conditions regardless of negligence and proximate cause, the trial court gave other instructions to the effect that the jury should find for the defendants unless they were satisfied by a preponderance of evidence that the loss was due to the postmaster's negligence. In-

structions 13 and 25 were to such effect. Instruction number 13 was as follows (R. 392):

> "You are instructed that the burden is on the plaintiff, who in this case is the United States of America, to prove not only the loss of money enclosed in the registered package described in plaintiff's complaint, but also that said loss occurred while the package was in the possession of and under the control of the Postmaster at Fairbanks, Alaska, and that the loss was occasioned by his carelessness or negligence by reason of his disregard of the law or regulations of the Postoffice Department pleaded in plaintiff's complaint, and unless the plaintiff proves every necessary fact by a preponderance of the evidence, then your verdict must be for the defendants."

Instruction number 25 was as follows (R. 402):

> "You are instructed that on the 15th and 16th day of September, 1921, the regulations of the United States Postoffice Department provided that postmasters would be held personally responsible by the Postoffice Department for depredation upon or loss of any registered letter or parcel, if such depredation or loss was due to negligence or disregard of the regulations of the Postoffice Department by the postmaster; and if you are satisfied a preponderance of the evidence that there was a depredations upon the registered package referred to in plaintiff's complaint on either of said dates, and before said package had left the possession of the postmaster at Fairbanks, then you are instructed that unless you also find by a preponderance of the evidence that said depredation upon said package and loss of the contents thereof was attributable to or was due to negligence and disregard by the postmaster of the law or regulations of the Postoffice Department, as alleged in plaintiff's complaint, then your verdict must be for the defendants."

Needless to say, the challenged instructions were not cured by the 13th and 25th instructions. The jury were directed, under a certain state of facts, to return a verdict for the plaintiff, and they had the right to assume, when so instructed, that the court in those instances determined as a matter of law, not only that a disregard of any of the postal regulations cast the postmaster with liability for the loss, regardless of proximate cause, but that he was an insurer of the safety of the package and responsible for its loss if he knew it contained money belonging to the United States.

It is elementary that where an instruction directs a verdict for the plaintiff, if the jury finds certain facts to be true, it must embrace all the things necessary to show the legal liability of the defendant, and to warrant the direction or conclusion that the plaintiff is entitled to a verdict; further, that where instructions are flatly contradictory they are necessarily prejudicial, since it cannot be ascertained upon what theory the verdict was returned.

In the case of *Armour v. Russell*, 144 Fed. 614, Judge Sanborn, speaking for the Circuit Court of Appeals for the Eighth Circuit, says:

> "The vice of a wrong rule in a charge of the court is not extracted by the fact that the right rule was also given therein, because it is impossible to tell by which rule the jury was governed."

In the case of *Durant v. Percy*, 93 Fed. 166, 169, Judge Sanborn says:

> "A general verdict on an erroneous instruction cannot stand, where there were two theories on which the jury might have found it, and under one of which the instruction was harmless, while under the other it was error, because the presumption from error is prejudice, and the court cannot say upon which theory the verdict stands."

In the case of *Standard, etc. Ins. Co. v. Sale*, 121 Fed. 664, Judge Severens, speaking for the Circuit Court of Appeals for the Sixth Circuit, says:

> "These instructions stated the law correctly. But the mere giving them without recalling or explaining the instructions given on the court's own motion would not be likely to remove the impression already made. In order to render an error harmless, it must be made to appear clearly that the party complaining of it was not prejudiced.
>
> The difficulty created by inconsistent or contradictory instructions on a material point is, first, that it is impossible for the jury to know which is to be their guide; and, secondly, it is impossible after verdict to ascertain which instruction the jury followed. Bank of Metropolis v. New England Bank, 6 How. 212, 12 L. Ed. 409; Gilmer v. Higley, 110 U. S. 47, 28 L. Ed. 62."

We are thus confronted with two questions:

First: Is a postmaster unconditionally liable for the loss of registered mail while in his possession if he fails to observe one or more of the postal regulations relevant to such mail, even though his negligence in no way contributes to the loss?

Second: Is he unconditionally liable as an insurer for the loss of registered mail while in his possession, if known by him to contain money belonging to the United States?

Unless one or both of these questions can be answered in the affirmative, the judgment herein cannot stand.

The Circuit Court of Appeals answered the first question in the affirmative and the second in the negative, but held that the error of the trial court in charging that the postmaster was an insurer, and responsible as such, was without prejudice, in view of the concession that he failed to observe some of the regulations relevant to registered mail.

Petitioners contend that both questions should be answered in the negative; that there is no more latitude under the postal regulations for charging a postmaster with responsibility for the loss of registered mail not proximately caused by his negligence than there is for charging him with responsibility as an insurer if the package contains Government property.

(a) Postmaster not liable unless loss is the result of negligence.

The universal rule is that negligence in the performance of a duty creates no liability unless the negligent act is the proximate cause of injury. The act must have been such that without it the injury would not have happened. On any other theory the imposition of liability requires contractual or

statutory authority for its enforcement. In the case of a postmaster, if he can be held responsible for the loss of registered matter for which his negligence was not the proximate cause, it can only be by virtue of some express statute or specific regulation of the Post Office Department, or by virtue of contractual liability which in its essence imposes upon him the obligations of an insurer. If no such statute or regulation exists, and if no duty as an insurer of registered matter is assumed, we submit that no valid liability can be charged against a postmaster without producing evidence fairly tending to prove that the loss complained of was the result of his negligence or disregard of some particular regulation.

The Circuit Court of Appeals found in Section 291 of the Postal Laws and Regulations authority for the conclusion that, for the loss of registered mail containing money belonging to the United States, a postmaster is responsible if he fails to observe any of the regulations relevant to such mail, irrespective of whether his negligence has causal connection with the loss, notwithstanding Section 940 of the regulations, which specifically limits his responsibility to loss arising from negligence.

Section 291 will be found on page 141 of the "Postal Laws and Regulations", 1913 Edition, and is as follows:

> "When a post office has been robbed, the postmaster shall immediately report all the facts to the Chief Inspector and to the post-office inspector in charge of the division in

which the post office is located. (See sec. 35.) The report should give, if possible, all the circumstances connected with the robbery, the date, a detailed inventory of the loss, the denominations of stamped paper stolen, the amount of postal and money-order funds and of each class of Government property. The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the property. If the loss includes the mail key the number should be given. (See sec. 1527.) Full particulars regarding registered mail lost or rifled should be reported. The chief Inspector shall promptly notify the Assistant Attorney General of every such casualty from which a claim for credit under the provisions of section 150 may arise."

Section 940 will be found on page 468 of said compilation, and is as follows:

"Postmasters and other postal employees will be held personally responsible by the Post Office Department for the wrong delivery, depredation upon, or loss of any registered letter or parcel if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations."

In its decision the Circuit Court of Appeals says (R. 547):

"There is no conflict between Sections 291 and 940. The latter defines the general responsibility of postmasters and the former their responsibility when postoffices are robbed. The general responsibility of a postmaster is that of a bailee charged with a high decree of care. U. S. v. Rogde, 214 F. 283, 295. If his postoffice is robbed and he has failed to exercise due care of the stolen property he is responsible absolutely and it is not necessary for the

Government to show that his want of care was the proximate cause of the loss."

(b) Section 940, not Section 291, defines responsibility when registered mail is stolen.

We submit that the Circuit Court of Appeals is in error when it says that Section 940 "defines the general responsibility of postmasters" and Section 291 "their responsibility when post offices are robbed". We submit that the court has given neither section its true significance. We submit that Section 291 defines the responsibility of postmasters for *Government property* stolen, and that Section 940 defines their responsibility for *registered mail* stolen.

(c) Structure of Regulations proves our contention.

Section 291 is a part of Subdivision V, of Chapter 3, of Title Three of the Postal Laws and Regulations. The subject of Title Three is "Post Offices". Chapter 3 thereof is entitled "General Provisions Relating to Post Offices". Subdivision V of Chapter 3, in which Section 291 is found, is entitled "Miscellaneous Provisions".

Section 940 is a part of Subdivision V, of Chapter 1, of Title Six of the Postal Laws and Regulations. The subject of Title Six is "Registry System". Chapter 1 thereof is entitled "Registration of Domestic Mail Matter". Subdivision V of Chapter 1, in which Section 940 is found, is entitled

"Treatment of Registered Matter at Offices of Delivery".

It is at once apparent that Title Three, which includes Section 291, covers *general* provisions, and that Title Six, which includes Section 940, covers *particular* provisions,—provisions relating exclusively to the registry system. The very structure of the Regulations challenges the conclusion of the Circuit Court of Appeals that Section 940 defines the general responsibility of postmasters and Section 291 their responsibility when post offices are robbed. We submit that the structure of the Regulations compels a conclusion directly to the contrary of that reached by the court.

(d) Section 291 applies to Government property only.

Considering Section 291, standing alone and unaffected by the structure of the Regulations, we submit that the responsibility of a postmaster thereby defined is confined to *Government property* stolen.

By its terms it requires him, when his office has been robbed, to make an immediate report to the inspector in charge, giving, if possible,

> "all circumstances connected with the robbery, the date, a detailed inventory of the loss, the denominations of stamped paper stolen, the amount of postal and money-order funds and of each class of government property."

Immediately following these directions comes the provision that "the postmaster shall be held *re-*

sponsible for the loss", etc. The loss referred to must necessarily be the property previously mentioned,—*all Government property.* Registered mail is not included. It is later in the section that registered mail is mentioned, and then in the following language:

> "Full particulars regarding registered mail lost or rifled should be reported."

The only duty or responsibility imposed upon the postmaster by this section of the regulations with reference to registered mail lost or stolen is to report full particulars thereof. If it had been intended to make the postmaster responsible for registered mail as for stamped paper and other Government property, we submit that registered mail would have been mentioned and included with the Government property referred to and have preceded the definition of the scope of the postmaster's responsibility. We submit that it is perfectly clear that the section was drafted with a design that the high degree of responsibility thereby created should apply only to Government property.

We submit that the form in which Section 291 is cast discloses a clear intent to omit all reference to the postmaster's responsibility for loss or theft of registered mail, and the reason why the section is so cast lies in the fact that his responsibility in that particular is elsewhere defined, namely, in Section 940.

(c) Section 940 applies to Registered Mail stolen.

Turning now to Section 940, and considering it standing alone and unaffected by the structure of the Regulations, we submit that it defines in unmistakable terms the responsibility of postmasters for registered mail stolen. We submit that there is nothing in the frame of the section which justifies the conclusion of the Circuit Court of Appeals that it defines the general responsibility of postmasters. It very definitely declares that they will be held responsible if wrong delivery, depredation or loss "of any registered letter or parcel" be due to their "negligence or disregard of the regulations". This is not a declaration of general responsibility. It is a declaration of specific responsibility, a responsibility conditioned upon the absence of due care, a responsibility that does not attach unless it is made to appear that if an omitted duty had been performed no wrong delivery, depredation or loss would have occurred, and a responsibility confined to a "registered letter or parcel".

Furthermore, the word "depredation" comprehends burglary, theft or robbery. One definition of the word "depredate", given by all authorities, is "to rob or pillage". In the case before us we have a definite instance of depredation. The package was broken open and a magazine substituted for the currency. If consequence is to be attributed to words, the case presented is not one of robbery at all, but purely one of depredation or theft. Robbery implies violence or threats of injury. No vio-

lence, no threat of injury, was resorted to in the case before us. That much, at any rate, we know.

It is clear, therefore, that to reach the conclusion that the responsibility of the postmaster was defined by Section 291 instead of by Section 940, the Circuit Court of Appeals was compelled to give to the word "depredation" found in Section 940 a literal or technical significance, a meaning not sufficiently comprehensive to cover a theft perpetrated as this one was, and to give to the word "robbery" found in Section 291 a liberal or general significance, a meaning sufficiently comprehensive to cover ordinary theft. We submit that the court was not justified in resorting to such an extremity. If it was compelled to give literal effect to Section 940, it was not at liberty to give general effect to Section 291. Justice cannot be the issue of such inconsistency.

While the regulations of the Post Office Department have the force of law, it is not to be supposed that they were drafted with the same refinement of definition as are criminal statutes. We maintain that the regulations should be construed or interpreted liberally so as to give effect to their intent or purpose. That it was the intent that Section 940, and not Section 291, should define the responsibility of postmasters for the theft of registered mail admits of no doubt. That this is so is obvious, not only from the language of the respective sections, but from the structure of the regulations as a whole, and from the fact that Section 940 is a part of Title Six relating to the registry system; and such being the obvious intent, we submit that it was the duty

of the court, under fundamental principles of statutory construction, to so construe other sections of the regulations, if it could be reasonably done, as not to nullify that intent. Section 940 ceases to be of any consequence, in instances of depredations, if the decision of the Circuit Court of Appeals is correct. Section 291 should be construed in such a way as to uphold and not nullify Section 940, and it is clearly susceptible of such a construction. Indeed, as we have pointed out, it is a manifestly unwarranted construction of Section 291 to make it applicable in any respect whatever to the responsibility of postmasters for the theft of registered mail.

(f) Saving clause of Section 291 inapplicable to registered mail.

On the proposition under discussion it is to be observed that if Section 291 defines the responsibility of postmasters for the theft of registered mail, a more onerous responsibility is cast upon them therefor than for the theft of Government property. Section 291 contains a saving clause, applicable to Government property stolen but impossible of application to registered mail stolen. Said clause reads:

> "The Chief Inspector shall promptly notify the Assistant Attorney General of every such casualty from which a claim for credit under the provisions of section 150 may arise."

Section 150 of the Regulations is Chapter 231 of the Act of May 9, 1888 (25 Stat. 135), as amended

by Chapter 424 of the Act of June 11, 1896 (29 Stat. 458). It is as follows:

> "The Postmaster General * * * is hereby authorized to investigate all claims of postmasters for the loss of money-order funds, postal funds, postage stamps, stamped envelopes, newspaper wrappers, and postal cards, belonging to the United States in the hands of such postmasters, resulting from burglary, fire, or other unavoidable casualty, and if he shall determine that such loss resulted from no fault or negligence on the part of such postmasters, to pay to such postmasters, or credit them with the amount so ascertained to have been lost or destroyed, and also to credit postmasters with the amount of any remittance of money-order funds or postal funds made by them in compliance with the instructions of the Postmaster General, which shall have been lost or stolen while in transit by mail from the office of the remitting postmaster to the office designated as his depository, or after arrival at such depository office and before the postmaster at such depository office has become responsible therefor: *Provided*, That no claim exceeding the sum of ten thousand dollars shall be paid or credited until after the facts shall have been ascertained by the Postmaster General and reported to Congress, together with his recommendation thereon, and an appropriation made therefor: *And provided further*, * * * that no claim for losses * * * shall be allowed unless presented within six months from the time the loss occurred.
>
> 2. It is hereby made the duty of the Postmaster General to report his action herein to Congress annually, with his reasons therefor in each particular case."

Provision is thus made to relieve a postmaster from the consequences of the responsibility imposed

by Section 291 for loss by theft where the loss is not the result of his negligence, *but the relief is confined to Government property stolen.* No provision is made for relief when registered mail is stolen. For the theft of registered mail, whether due to his negligence or not, Section 291, if it applies, casts the postmaster with a responsibility limited only by the value of the thing stolen, and from which he cannot be relieved, if he has failed to observe any of the regulations, and this despite the fact that the liability of the Government is limited to $100.00.

A postmaster knows what Government property is in his care and he knows its value. As to such property he knows the extent of his liability. But he has no means of knowing the value of registered mail entrusted to his care, unless the person registering it voluntarily declares its value. He cannot compel a declaration. He is obliged to accept the parcel and, should it be stolen while in his care, obliged to make good its full value, if he has failed to fully observe the regulations, even though his neglect in no way contributed to the theft.

It thus appears, if the decision of the Circuit Court of Appeals is correct, that a more onerous responsibility is cast upon postmasters for the loss by theft of registered mail than for the loss by theft of Government property, and a more onerous responsibility for registered mail than the Government itself assumes. It is inconceivable that the postal regulations were drafted with such a design,

and we submit that they are not reasonably susceptible of such a construction.

In the case of *United States v. Rogde*, 214 F. 283, 294, Judge Elliott says, after quoting Section 150 of the Regulations last hereinabove quoted:

> "By an act approved January 21, 1914, the indemnity above provided for was extended to include postal savings funds, postal savings cards, postal savings stamps, postal savings certificates, key deposit funds, funds deposited to cover postage on mailing, and funds deposited to cover orders for stamped envelopes. Congress by the statutes has expressly provided for the relief of postmasters from absolute liability that is imposed upon them by statute for the property that belongs to the government of the United States. The very fact that these statutes have never been extended to cover ordinary mail matter or registered mail is persuasive at least that such extraordinary liability with respect to mail matter was never contemplated and that the interpretation given the statutes and regulations by Congress was that there existed no such liability without negligence."

For the foregoing reasons we respectfully submit that the responsibility defined by Section 291 applies to Government property alone, and that Section 940 defines the responsibility of postmasters as to registered mail.

(g) Theory of responsibility as an insurer untenable.

By the 22nd instruction (assignment of error No. 28) the trial court charged that the postmaster was liable for the loss of the package if he knew that

it contained money belonging to the United States, even though he observed all of the regulations relevant to its care.

The Circuit Court of Appeals disapproved this instruction, but held that it was error without prejudice in view of the particular facts of the case.

If we are right in our contention that Section 940 and not Section 291 defines the responsibility of a postmaster for the loss of registered mail, it follows that the giving of the 22nd instruction was prejudicial error. We now wish to inquire whether there was justification for said instruction.

The trial court based said instruction upon Section 360 of the postal regulations, the decision of this court in the case of *Smythe v. United States*, 188 U. S. 156, and the oath taken by the postmaster upon his assumption of office. This oath, in part, was as follows:

> "I will honestly and truly account for and pay over any money belonging to the United States which may come into my possession or control." (R. 15.)

Section 360 of the Postal Regulations is Section 3846 of the revised statutes, and is as follows:

> "Postmasters shall keep safely, without loaning, using, depositing in an unauthorized bank, or exchanging for other funds, all the public money collected by them, or which may come into their possession, until it is ordered by the Postmaster General to be transferred or paid out."

The case of *Smythe v. United States* involved the liability of the superintendent of the Mint at New

Orleans for the loss, without his negligence, of Government money in his possession. The money in question was destroyed by fire while contained in a vault in the Mint, the superintendent being in no way negligent in its care. The contention of the Government, which this court upheld, was that the superintendent, under statutory duties which he had sworn to perform, was under the obligation, practically, of an insurer in respect of all public funds coming into his hands, and could not be relieved unless the loss occurred by the act of God or the public enemy. His duties as prescribed by statute required him, among other things, *to safely keep*, until legally withdrawn, all moneys or bullion which should be for the use or the expenses of the Mint. His oath of office bound him to faithfully perform the duties thereof, and his bond was conditioned that he should do so. The court says:

> "The government can stand upon the terms of its special contract with the superintendent, and insist that he has not discharged his duties by safely keeping the moneys that came to his hands, and which he undertook to pay over, when required. * * * They [the treasury notes received by Smythe] were not safely kept, nor were they destroyed through overruling necessity or by the public enemy. Hence, there was a breach of his bond."

In other words, when Smythe took the oath and accepted the office of superintendent of the Mint, the statutory liability to safely keep all money which was for the use or the expenses of the Mint became an obligation of his contract of employment,

and was enforceable against him unaffected by any element of negligence.

Now it is quite obvious that the foregoing decision did not justify the 22nd instruction in the case before us unless it can be said that under Section 360 of the Postal Regulations a postmaster is required to "keep safely, without loaning, using, depositing in an unauthorized bank, or exchanging for other funds" a registered package coming into his possession and known by him to contain money belonging to the United States. By merely taking an oath to faithfully perform his duties and account and pay over any money belonging to the United States that may come into his possession, a postmaster certainly does not assume the responsibility of an insurer of registered mail belonging to the Government unless such responsibility is cast upon him by said Section 360.

We submit that there is nothing in the language of said section consistent with an intent to define a postmaster's responsibility as to government funds being transmitted by means of the registry system. Registered matter does not come into a postmaster's possession in the sense that money collected by him comes into his possession. He is not the custodian of registered matter as he is the custodian of money he collects. He does not hold registered matter until it is ordered to be transferred by the Postmaster General, even though the package might contain government money. He could not loan, or use, or deposit, or exchange for other funds money of the Government contained in

a registered parcel, without unlawfully breaking open the parcel and extracting the contents. It is ridiculous to contend that Section 360 was promulgated with any thought to define the duties of a postmaster as to government money unlawfully extracted by him from a registered package. In fact it is impossible to sensibly apply the provisions of Section 360 to the duties of a postmaster relative to registered matter in any particular whatever.

Subjoined to Section 360 is a note reading:

> "The regulations relative to the care of public funds apply to money-order, key-deposit, and postal savings funds as well as postal funds."

If it had been the intent to apply the regulations relative to the care of public funds to registered matter containing such funds, we would expect to find it stated here. A matter of such importance would not be left to inference.

Furthermore, if it was the purpose of the Post Office Department to hold postmasters accountable for registered matter containing such money, to the same extent as for postal funds, we would expect to find a definite regulation to that effect embodied in Title VI of the Regulations, relating to the Registry System. But no such provision exists. On the other hand there does exist Section 940, a part of Title VI, providing, as heretofore pointed out, that postmasters are responsible for the loss of registered matter only when occasioned by their negligence or disregard of the regulations. That section,

obviously designed to define and limit the responsibility of postmasters for registered matter, does not distinguish between packages registered for individuals and packages registered for the Government, which we submit it necessarily would do if it had not been intended to apply to all cases.

For the foregoing reasons we respectfully submit that a postmaster is not responsible for the loss of registered mail unless the loss is the proximate result of his negligence; that he is not responsible as an insurer for the loss of registered mail known by him to contain money belonging to the United States; that, therefore, the Circuit Court of Appeals was right in holding that the trial court erred in giving the 22nd instruction, but was wrong in holding that the error was without prejudice.

II.

IF A POSTMASTER IS RESPONSIBLE AS AN INSURER OF REGISTERED MAIL CONTAINING MONEY BELONGING TO THE UNITED STATES, HIS RESPONSIBILITY IS NECESSARILY CONDITIONED UPON HIS HAVING KNOWLEDGE OF THE OWNERSHIP AND CONTENTS OF THE PACKAGE; AND RECOVERY CANNOT BE HAD AGAINST HIM FOR THE LOSS OF SUCH MATTER WITHOUT ALLEGING IN THE COMPLAINT THAT HE POSSESSED SUCH KNOWLEDGE WHILE THE PACKAGE WAS IN HIS CARE, AND WITHOUT PRODUCING EVIDENCE TO PROVE SUCH ALLEGATION. IN THIS CASE THERE WAS NEITHER ALLEGATION NOR PROOF OF SUCH FACT.

If under the postal laws or regulations a postmaster is responsible as an insurer of registered mail containing money belonging to the United States, we suppose it will not be claimed that such responsibility arises if he is ignorant of the character and ownership of the package. We assume that it will be conceded that such a high degree of responsibility would arise only where he had information that he was being entrusted with the care of such property. It would be manifestly unjust, and contrary to reason, to charge him with such responsibility for property which he did not know belonged to the Government.

The trial court realized that it was impossible to hold the postmaster responsible as an insurer unless the jury found that he knew that the package contained money belonging to the Government, and it

will be observed that the 22nd instruction definitely charges the jury that such knowledge was a prerequisite to the assumption of such responsibility.

By instruction No. 14 (R. 392-394) the trial court informed the jury that the Alaska Engineering Commission was a governmental agency, maintained by appropriations from the United States Treasury, for the purpose of constructing and operating the Alaska Railroad, and that if they found that the money contained in the registered package was in exchange for checks belonging to the Commission, such money was the property of the United States. There was evidence, admitted over defendants' objection, that the money contained in the package was in exchange for checks belonging to the Commission. There was no evidence to the contrary. In this situation instruction number 14 was the equivalent of a direct charge that the money in the package was Government property. The jury were not at liberty to consider it otherwise.

By the 17th instruction (assignment of error No. 25) the jury were charged that they were warranted in assuming and finding that the postmaster believed the package contained Government money if the clerk who received and registered it believed it contained money, not Government money, but just money; that the belief of the clerk was imputable to the postmaster.

The three instructions (Nos. 14, 17 and 22) were not in sequence. They were intermingled with other instructions not relevant to the proposition to which

they applied. It is necessary, however, to consider them together, as presenting to the jury the law on a particular theory of the case; otherwise, the 17th instruction, bearing upon the registry clerk's belief as to the contents of the package, and imputing her belief to the postmaster, was an entirely useless instruction. We are privileged to assume that the jury attributed consequence to this instruction as well as to all others, and they necessarily construed it as meaning that belief and knowledge were synonymous states of mind; that if they found that the registry clerk *believed* the package contained money they were warranted in finding that the postmaster *knew* it contained money, or government money, since the belief of the clerk was imputed to the postmaster. The three instructions were therefore the equivalent of a charge that the jury should return a verdict for the plaintiff if they found (1) that the package contained government money, (2) that the clerk who registered it believed it contained money (not necessarily government money), and (3) that the theft occurred in the Fairbanks office.

But there was no evidence whatever, direct or circumstantial, that either the postmaster or the registry clerk knew what the package contained. That being so, the jury must have concluded, if they gave their verdict upon the theory of the postmaster's responsibility as an insurer, that the registry clerk believed that the package contained money and that her belief was enough to charge the postmaster with knowledge that it did, in view of the

17th instruction that the clerk's belief was imputable to him. As we have said above, the jury had the right to assume, and presumably they did, that every instruction should be given effect. The 17th instruction could have meant nothing less to them than that belief and knowledge were synonymous states of mind.

Construing the instructions as the jury unquestionably construed them, they were clearly erroneous, for it is well settled that belief is not the equivalent of knowledge. In the case of *Iron Silver Mining Co. v. Reynolds*, 124 U. S. 374, 31 L. Ed. 466, it is said:

> "Between mere belief and knowledge there is a wide difference. The Court could not make them synonymous by its charge and thus in effect incorporate new terms into the statute."

The Supreme Court of California said in *Humphreys v. McCall*, 9 Cal. 59, 62:

> "There is a clear distinction between positive knowledge and mere belief, and they cannot both exist together."

It is perfectly obvious that belief admits of all degrees, from the slightest suspicion to the fullest assurance; but knowledge admits of no degrees. In the instant case, the postmaster could not be held responsible as an insurer in the absence of knowledge that government funds were being intrusted to his care. It was not enough to call forth such responsibility that fortuitous circumstances created in his mind, or in the mind of the registry clerk, a suspicion or even some assurance that the package

contained money or government money. He was entitled to notice, to positive information, of that fact, so that he could take the necessary precautions to safeguard his responsibility. He was not obliged to be on guard. He was not obliged, if he suspected or even believed that the package contained money, to make inquiry and ascertain with certainty what it contained. He was not in the position of a purchaser of property with notice of facts sufficient to put him upon inquiry relative to the existence of an unrecorded conveyance. It was no part of his duty to investigate. The rule that notice of facts and circumstances which would put a man of ordinary prudence on inquiry is, in the eyes of the law, equivalent to knowledge of all the facts a reasonably diligent inquiry would disclose, applies only where inquiry becomes a duty. (29 Cyc. 1114.) It is inapplicable here for the obvious reason that the duty rested upon the forwarder of the package to notify the postmaster of its contents and not leave the postmaster to the hazard of acquiring the information otherwise. In failing to so notify the postmaster the forwarder, who in this case was the agent of the Government, was negligent. There was no negligence on the part of the postmaster.

For the foregoing reasons we submit that instructions 14, 17 and 22, considered in their entirety, were erroneous.

But we contend that instruction No. 17 was erroneous for still another reason. We contend that there is no support in the law for the proposition that the mere belief of the registry clerk was im-

putable to the postmaster. We may concede that, as a general proposition, a postmaster is chargeable with the knowledge acquired by his employee while acting in the course of his employment and within the scope of his authority. We may concede that as a general proposition a postmaster is chargeable with the knowledge obtainable from inquiry prompted by notice to his employee, acquired while acting in the course of his employment and within the scope of his authority, of facts and circumstances sufficient to put an ordinarily prudent person upon inquiry. Such is the general rule in the relation of principal and agent. But the rule has no application here for two reasons. In the first place the registry clerk did not know that the package contained money. She testified that she was not sure. She merely thought it contained money. Therefore she had no knowledge that could be imputed to the postmaster. In the second place, there being no duty of the postmaster to make inquiry as to the contents of the package, he was not chargeable with what his registry clerk thought or believed about it. Even if the clerk told him what she thought or believed, no obligation was cast upon him thereby, as he was under no duty to investigate.

We submit, therefore, that the 17th instruction was erroneous from either point of view. If it was given upon the theory that belief and knowledge were synonymous, it was erroneous on that ground. If it was given upon the theory that belief was something less than knowledge, it was still erroneous, for the reason that anything less than actual

knowledge was not sufficient to cast any duty or responsibility upon the postmaster.

The instruction is subject to the further criticism that it advises the jury that they were warranted in assuming and finding that the postmaster believed the package contained money, and that said money was government property, if they found that the registry clerk believed it contained merely money. The effect of the instruction was to impute to the postmaster something more than the clerk's belief,—to impute to him belief as to ownership of the thing in addition to belief as to its character.

Instructions 17 and 22 were further erroneous in presenting any issue to the jury based upon the postmaster's knowledge of the contents of the package. Instruction 17 says "that it is claimed by the plaintiff in this case that the defendant Deal knew that the registered package contained money belonging to the plaintiff herein". There is no such allegation in the complaint. There is no allegation from which such fact can be implied. Instruction 22 directs the jury to give a verdict for the plaintiff if they find that the postmaster knew the package contained government money and also found that the loss occurred in the Fairbanks office. Since no issue was presented on the proposition of the postmaster's knowledge, it was error to instruct the jury along that line. The authorities to this effect are numerous and need not be cited. They will be found in the American Digest under the subject of "Trials", Section 251(1).

Finally, on the general proposition of the postmaster being chargeable with the belief of the registry clerk, we contend that there was no evidence to sustain a finding that the clerk believed the package contained money. Her testimony on the subject was brief, consisting of an answer to only one question asked her by counsel for plaintiff, whose witness she was:

> "Q. Did you have any knowledge as to what the parcel contained?
>
> A. Well, I thought it was money. I wasn't sure." (R. 54.)

What the clerk thought, in view of her admission that she was not sure, cannot be said to be of the dignity of a belief. When she said she was not sure, she in effect said she was not in possession of sufficient information to form a belief; and when she stated that she thought it contained money, she in effect said she supposed it did, without having any belief whatever on the subject. The answer was pure surmise and speculation.

Nor was there any other fact or circumstance in evidence justifying a finding that she believed the package contained money. She of course knew that the package came from the bank, but the messenger who brought it did not inform her of its contents, nor was she otherwise informed. It might have contained blank checks, or cancelled checks, or certificates of stock, or documents, or various things other than currency. The single circumstance that it came from a bank was not enough to justify a belief that it contained money. The circumstance

might have created a suspicion, but it could do no more. Nor was the circumstance that the package was franked sufficient to justify a belief that it contained money. Such circumstance would justify a belief that the sender or receiver bore some relation to the Government, but further than that it could have no significance.

It is submitted, therefore, that irrespective of any infirmity in the instructions on the theory of the postmaster's responsibility as an insurer, since there was no allegation and no evidence that the postmaster had actual knowledge of the contents of the package, a verdict in favor of plaintiff based upon that theory cannot be sustained.

III.

THE COMPLAINT FAILED TO STATE A CAUSE OF ACTION IN THAT NO PARTICULAR ACT OF NEGLIGENCE WAS CHARGED AS BEING THE CAUSE OF THE LOSS, AND WAS THEREFORE VULNERABLE TO DEFENDANTS' DEMURRERS.

If the postmaster in this case was not responsible as an insurer for the loss of the registered package, and if he was not responsible in any event unless the loss was the proximate result of some negligence on his part, it follows, if the complaint failed to state a cause of action for damages arising from negligence, that defendants' demurrers to the complaint and their motions to make it more definite and certain should have been sustained. These de-

murrers and motions were overruled. (Assignments of error 1 and 2.) They raised the point that the complaint was deficient in that no particular act of negligence of the postmaster was alleged as being the cause of the loss and that it was not alleged which of the regulations he disregarded that resulted in the loss. While the ruling of the trial court on the motions to make more definite and certain were not reviewable on writ of error, the demurrers presented the same propositions, and reference is made to the motions to show what was considered in the determination of the demurrers.

The fatal defect in the complaint, considered as one for negligence, is that no negligent act or omission is charged. Negligence as a conclusion is charged, but no specific act having causal connection with the theft of the package is alleged to have been negligently performed, nor is it alleged that any specific duty or series of duties, having such connection, was or were negligently omitted.

The allegation is that the package was opened and rifled "due to the negligence of said T. H. Deal, and due to the disregard of the postal laws and regulations by said T. H. Deal". (R. 6.)

If the complaint contained no more than the single allegation that the package was opened and rifled "due to the negligence of said T. H. Deal", we do not suppose it would be seriously contended that a cause of action was stated. Such an allegation does not state what was done, in the doing of which there was negligence. It is as vital and nec-

essary to allege *what was done* as it is to allege that there was negligence in what was done; but when the negligent act has been properly set forth in the complaint, the fact that it was negligently done may be so pleaded, without stating in detail in what the negligence consisted.

In 29 Cyc. at page 570 it is said:

> "While there is not entire harmony in the adjudicated cases as to the proper method of pleading negligence, the rule sustained by the weight of authority is that, negligence being the ultimate fact to be pleaded and not a mere conclusion of law, a declaration or complaint *charging defendant with an act injurious to plaintiff*, with a general allegation of negligence in the performance of the act, is sufficient." (Italics ours.)

In California the rule is expressed as follows in the case of *Smith v. Buttner*, 90 Cal. 95:

> "It is well settled that negligence may be charged in general terms; that is, *what was done being stated*, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent. *But it must appear from the facts averred that the negligence caused or contributed to the injury.*" (Italics added.)

And in the later case of *Maxwell v. Durst*, 178 Cal. 752, the same court says:

> "*What was done*, with the charge that the same caused or contributed to the injury, *must be alleged*, but to show that there was negligence in what was done, which is likewise essential, it is sufficient to allege that it was negligently done, without stating more particularly what the matters constituting such negligence were." (Italics added.)

As pointed out by the same court, in the case of *Stephenson v. Southern Pacific Co.*, 102 Cal. 143:

> "Negligence is not the *act* itself, but the fact which defines the character of the act, and makes it a legal wrong. * * * It is sufficient to allege the negligence in general terms, *specifying, however, the particular act alleged to have been negligently done.*" (Italics added.)

The foregoing authorities are sufficient, without citations from other jurisdictions, to show the distinction between a negligent act and the particular in which the act was negligent. The act itself must be set forth in sufficient detail to present an issue, to inform the defendant what it is that plaintiff claims the defendant did or neglected to do, the doing of which resulted in the injury; but the fact that the act was negligently done may be stated in general terms.

The allegation we find in paragraph IX of the complaint, that the package was opened and rifled "due to the negligence of said T. H. Deal", is obviously insufficient. No act of commission or omission is stated. It is equally obvious that the same deficiency exists in the allegation in said paragraph, that the package was opened and rifled "due to the disregard of the postal laws and regulations by said T. H. Deal". Such an allegation is merely another way of saying that the postmaster failed to perform his duty, without specifying any duty which would necessarily have causal connection with the theft of registered parcels. Manifestly, there are various postal laws and regulations which could be disregarded with impunity, without in the least

affecting the safety of mail or registered matter. If an allegation of that kind were sufficient, it would never be necessary in negligence cases to set forth the particular act or omission which it was claimed occasioned injury. If such an allegation were sufficient, it would be enough, in an action against a carrier, to allege merely that it neglected its duty towards the injured person; or, in an action against a physician for malpractice, merely that he neglected his duty towards the patient.

In *Thompson on Negligence*, Section 7458, the rule is stated as follows:

> "It will not be sufficient to allege that a duty existed upon the part of the defendant, and that he violated such duty; but the facts must be stated, showing the legal liability. Unless the duty results, in all cases, from the stated facts, the declaration so framed will be bad."

Nor can it be said that the allegations contained in paragraph X of the complaint eke out its insufficiency. It is there alleged that prior to and at the time of the loss the postmaster

> "failed, refused and neglected to perform his duty as such with reference to said registered package of mail matter in the manner required by law, and violated the obligations of said bond and writing obligatory referred to in paragraphs IV, V, and VI of the complaint herein."

This is the same allegation as is contained in paragraph IX, just considered, stated in slightly different language. The allegation is a pure conclusion. No facts are alleged from which it can be

determined that the theft of the package was occasioned by any act or omission of the postmaster.

The further allegation in paragraph X, that the postmaster

> "failed to observe, perform and discharge the duties and trusts imposed upon him by law and the regulations of the Postoffice Department with reference to said registered package,"

is another conclusion of the same character. So, also, is the allegation that the postmaster

> "failed and neglected to use ordinary care in handling the said registered package."

Since negligence is the lack of ordinary care, the allegation that the postmaster failed to use ordinary care in handling the package amounts merely to an allegation that he was negligent in handling the package, which is a pure conclusion.

The same criticism applies to the allegation that the postmaster

> "failed and neglected to properly protect and safeguard the said registered package as registered mail matter."

It is a pure conclusion, that he neglected to properly protect and safeguard the package. What he did that he should not have done, or what he failed to do that he should have done, in the protection of the package, should have been definitely stated, and it was then for the jury to determine whether, under all of the facts and circumstances in evidence, he neglected to properly protect the package.

The further allegations that the postmaster

> "failed and neglected to handle said registered package as such in the manner prescribed by law and the regulations of the Postoffice Department, and handled the same in a careless and negligent manner, and in utter disregard of the law and the said regulations aforesaid, particularly of sections 361, 524, 940 and 1015 of the regulations of said Postoffice Department promulgated in 1913,"

do not supply the necessary facts for the statement of a case. They are each and all pure conclusions, failing to specify any act of omission or commission which caused or contributed to the theft.

A complaint based upon negligent conduct must not only show the particular duty or duties owed by the defendant to the plaintiff, a breach thereof, and the injury sustained, but also a causal connection between the act and the injury. An allegation that the defendant's negligence was the proximate cause of the injury is insufficient when not sustained by the facts alleged. Causal connection between the act and the injury *must appear from the facts alleged*. If no facts are alleged, it is impossible to say that the injury proximately resulted from the act complained of; and even if the facts are averred, if there is a hiatus in the link of alleged causal connection, the complaint is deficient. These are elementary propositions of pleading in negligence cases.

In the instant case, no facts are stated from which it can be determined that the theft of the package proximately resulted from any act of the postmaster

or any breach of duty of the postmaster. Plaintiff was required to do more than simply allege that due to the postmaster's neglect of duty the theft occurred, for the obvious reason that many duties, even those relating to registered matter, could be wholly disregarded without jeopardizing the safety of a registered package. The Regulations (Section 891) require that all registered matter dispatched in iron-lock mail bags shall be accompanied with registered package receipt card or a manifold bill describing each registered package. Failure to comply with this requirement could not possibly have causal connection with the theft of the contents of the bag. And as to duties not relating to the registry system, even more particularity was required in stating the facts of the alleged negligent act or omission in order to show causal connection of the theft therewith. The postmaster had manifold duties,—duties relating to the money order system, to the delivery service, to ordinary mail matter, as well as to registered matter. Plaintiff's complaint comprehended the entire field. Sections 361 and 524, neither of which relates to the registry system, are specially referred to in the complaint, but no facts are alleged from which it appears that the theft could possibly result from any breach of duty imposed by either of these sections. Section 361 reads:

> "Postmasters must exercise all possible care for the protection of the public funds and property in their custody.
>
> If the post office is not such a reasonably safe place as to warrant the postmaster in leaving

his own funds in it at night, or when the building is unoccupied, all moneys and postage stamps should be removed to a place of greater security. During business hours money and postage stamps should be kept in places inaccessible to the public and concealed from view.

When funds or postage stamps are left at night in offices unprovided with iron safes, they must be kept in strong drawers or other fixed receptacles, which must be securely fastened with good locks. The doors and windows of the office should be made as secure as possible. The same precautions shall be taken when the post office is closed temporarily during the day.

Where stamps and funds are kept in iron safes with 'combination locks', such safes shall be carefully and completely locked at night or when the office is left without occupants. No credit will be allowed for losses from safes fastened only with what is termed a 'day lock' or 'day combination'.

A postmaster upon taking charge of his office shall immediately change the combination on every safe therein; and where at any time a safe is procured, either new or second hand, he shall immediately change the combination. Failure to make such change shall be considered as prima facie evidence of contributory negligence on the part of the postmaster in any case where claim is made for credit for money or other property stolen from such safes which have been opened without resort to violence."

It is clear from a casual reading of said section that it does not relate to registered matter at all. It refers to the care of public funds and property exclusively. The duty of a postmaster in the matter of changing the combination on the safe, and the matter of keeping the safe completely locked, be-

comes of consequence only when he asks to be credited for public funds stolen therefrom. The duty to change the combination and to keep the safe completely locked is nowhere imposed upon him for the care of registered packages; therefore, any neglect on his part to do these things was not *per se* an omission of any duty having causal connection with the theft of the package. It is obvious, therefore, that if the theft of the package was proximately caused by the failure of the postmaster to change the lock on the safe, or to completely lock the safe, his liability or responsibility for the loss did not arise from a breach of any duty imposed by Section 361, but from neglect to keep the package in a place of reasonable security, and what he did or neglected to do in this respect should have been definitely alleged. Upon such an issue the jury would have been required to determine whether he exercised such care for the safety of the package as the circumstances demanded. They might very well have believed that reasonable prudence did not require the safe to be completely locked; or they might have believed that failure to completely lock the safe was not the proximate cause of the theft. They certainly could not have believed that failure to change the combination had anything to do with the theft unless there was evidence that the theft was perpetrated by a person familiar with the combination, and if this was the theory upon which plaintiff intended to maintain the case, the complaint should have stated the facts.

It will be noted, in passing, that the jury were instructed that failure on the part of the postmaster to completely lock the safe, and to change the combination, was actionable negligence *per se*, casting upon him responsibility for the theft if it took place in his office. The charge was erroneous, not only because it omitted the element of proximate cause, but because the duties prescribed by Section 361 do not relate to registered matter at all.

Let us now consider Section 524, specifically referred to in the complaint. It reads:

> "Postmasters shall not permit to have access to any mail matter in the post office any persons except duly sworn assistants, clerks, letter carriers, post office inspectors, and those mail contractors and carriers who, under the terms of the contract, are required to perform duties necessitating their personal presence in the post office. (Amendment of June 11, 1919.)
>
> Mails should not be made up or handled within reach of unauthorized persons, and such persons should be excluded from the room appropriated to the use of the post office while the mails are being opened or made up.
>
> An ex-postmaster shall not be permitted to have access to or handle mail unless he takes the oath of office anew.
>
> Postmasters shall always require post office inspectors to exhibit their commissions before being admitted to the post office, in order to avoid imposture, unless such officers are personally known to them."

It is not alleged in what particular these duties were ignored, or that they were ignored at all. The allegation is that the postmaster handled the pack-

age "in a negligent manner and in utter disregard of the law and the said regulations aforesaid, particularly of Sections 361, 524", etc. But even if this could be construed as the equivalent of an allegation that the postmaster permitted an unauthorized person to have access to his office while the package remained there, the complaint was still insufficient because there was lacking the essential allegation that such person committed the theft or that he was an accessory to the theft. As above pointed out, it must appear from the facts averred, and not as a conclusion, that the negligence complained of was the proximate cause of the theft. It goes without saying that to support a judgment against the postmaster for the loss of a package based upon his act in permitting an unauthorized person to have access to his office, evidence was required to show that such person was in some manner connected with the theft. Negligence in permitting unauthorized persons to have access to the office called forth no liability of the postmaster for the loss if such persons were innocent of any connection with the crime. As it was necessary to produce proof, equally necessary was it to allege that the unauthorized person was the criminal. In the absence of such an allegation, no fact was averred from which it was made to appear that a violation of any provision of Section 524 had any causal connection with the theft.

Section 940 of the regulations is also specially referred to in the complaint as one "in utter disregard" of which the postmaster handled the pack-

age "in a careless and negligent manner". The section reads:

> "Postmasters and other postal employees will be held personally responsible by the Post Office Department for the wrong delivery, depredation upon, or loss of any registered letter or parcel if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations."

The inefficacy of a reference to this section to show any negligent act or omission having causal connection with the theft of the package is at once apparent. Indeed, reference to the section emphasizes the necessity of stating in what the alleged negligent act consisted and which it is claimed proximately caused the loss. The burden was upon the plaintiff not only to prove but to allege a case within the terms of this section.

Section 1015 of the Regulations of 1913 is another section specially referred to in the complaint. Said section reads:

> "Postal employees shall use registered paper jacket envelopes in the dispatch of five or more separate registered articles addressed to or intended for distribution by the same post office, railway post office, or transfer clerk, when at least one record and handling of the articles in transit will thereby be saved.
>
> Postmasters at offices in Alaska are authorized to use registered paper jacket envelopes in the dispatch of one or more letters and small sealed parcels, when the method of handling the registered matter in transit or the conditions of its transmission justify the use of jackets in order to give greater protection to the mail.

> When applicable the rules governing rotary-lock pouches and sacks shall be observed in the opening and closing of registered jacket envelopes; in other respects the treatment of the jacket envelopes shall be as prescribed for registered letters and parcels, except as modified herein."

Nowhere in the complaint is it made to appear that a disregard of the provisions of this section could possibly have any causal connection with the theft of the package, especially a theft occurring in the office. The section obviously has to do with the security of mail matter while in the course of transmission, after having been dispatched from the forwarding office. The section does not require registered packages to be kept in these jackets while remaining in the office. The theory of the complaint was that the package was rifled while it remained in the possession of the postmaster, not while it was in the course of transmission. That being so, we submit that it is impossible to conceive how any disregard of the provisions of Section 1015 could in the slightest degree contribute to the theft, and if plaintiff had attempted to allege facts showing such connection, instead of alleging it as a conclusion, the impossibility of so doing would have been instantly apparent.

Enough has been said to show how inadequate was the complaint to state any negligent act or omission of the postmaster having causal connection with the theft. It is perfectly clear from the frame of the complaint that the Government had

no knowledge that the theft of the package was due to any negligent act of the postmaster. This is confirmed by the failure of the Government to produce any evidence reasonably tending to prove such fact. It is perfectly clear that the sole foundation of the action was surmise and suspicion, and it is equally clear that the jury determined the cause solely upon surmise and suspicion. For this reason it cannot be said that the denial of defendants' motions and demurrers was harmless error. If plaintiff had been required to state in the complaint the particular act or acts of negligence complained of, with sufficient particularity to make it appear that the theft of the package was the proximate result thereof, the jury would readily have seen that no evidence was before them to sustain the charge; but when all that was alleged was the conclusion that the postmaster neglected his duties, and that due thereto the package was rifled, and when it was conceded that the postmaster failed in some respects to perform his duties, the jury were given the opportunity, indeed, they were constrained, to base their verdict upon surmise and suspicion. It was the natural thing for them to believe that it was their duty to determine where the loss occurred and who was responsible for it. Not having before them any evidence definitely establishing that the theft occurred outside of the Fairbanks office, they would naturally believe they were obliged to find that it occurred in that office, notwithstanding that the burden was upon the plaintiff to prove

that it occurred there. Once having concluded that the theft took place in the office, and no evidence being before them as to how it occurred, they would naturally believe they were obliged to find that it was due to some negligence on the part of the postmaster, notwithstanding that the burden was upon the plaintiff to prove that the theft was the result of the postmaster's negligence. It is the purpose of pleadings to present a definite issue, to which the evidence must be directed, and upon which the trial court is supposed to properly instruct the jury as to the law. In this case we know that, in view of the instructions, the jury had no liberty of judgment, but even otherwise, in view of the allegations of the complaint, the defendants were compelled to risk a result arrived at, not from a fact alleged and supported by evidence, but from a conclusion supported only by suspicion.

We submit that in a case of the character of the one at bar, it cannot be said that no injustice resulted to the defendants from the defects of the complaint here considered, even if the jury had been correctly instructed as to the law.

IV.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT, AS IT WAS NOT SHOWN THAT THE POSTMASTER'S NEGLIGENCE HAD CAUSAL CONNECTION WITH THE LOSS, AND AS THE FACTS AND CIRCUMSTANCES THAT WERE CONSISTENT WITH THE THEORY THAT THE LOSS OCCURRED IN THE FAIRBANKS OFFICE WERE EQUALLY CONSISTENT WITH THE THEORY THAT IT OCCURRED WHILE THE PACKAGE WAS BEING TRANSPORTED TO NENANA.

Petitioners contend that no evidence was adduced to support a finding that the theft of the package was proximately caused by any negligence of the postmaster, or a finding that the theft occurred in the Fairbanks office. It was necessary that these two facts be established before any valid judgment could be given against either the postmaster or his surety, and the burden of proof was upon the plaintiff.

Consider, first, the proposition that the theft was proximately caused by the postmaster's negligence. The burden was upon the plaintiff to prove this fact. As is said in the case of *Puget Sound, etc. Co. v. Hunt*, 223 Fed. 952, 956:

> "The proximate cause of an injury is never presumed. On this question there is no conflict of authority. See 29 Cyc., 600, and the numerous cases there cited."

Furthermore, as stated by the California District Court of Appeal, in the case of *Hopkins v. Heller*, 210 Pac. 975:

> "The evidence must be such that more than a suspicion or surmise arises therefrom. The burden of proof resting upon the plaintiff requires that the evidence of negligence proximately causing the injury be evidence which leads—not merely wavers—toward the fact sought to be proved."

What evidence is there that the theft of this package was the result of any negligence of the postmaster or of any disregard of his duties? We say, and we emphasize it, that there was none at all. It is to be remembered that no act or omission of the postmaster can be said to be the proximate cause of the theft unless it is made to appear that the theft would not have occurred if the negligent act had not been done or if a given duty had not been omitted. Of course, it is not claimed that the postmaster was guilty of any affirmative act of negligence. The only claim is that he failed to do what he should have done.

Now it is not shown nor attempted to be shown that the package was rifled as a consequence of any duty omitted by the postmaster. It is not shown that the thief was a person who was permitted to have access to the mail contrary to postal regulations. It is not shown that the depredation was due to the postmaster's failure to seal the jacket in which the package was placed, or by his failure to personally witness its contents, or to instruct the stamp clerk in her duties relative thereto. It would be impossible to ascribe the theft to any such neglect of duty, since the jacket was not to be

sealed until the package was ready for transmission. It is not shown that the failure of the postmaster to fully lock the safe, or to change the combination of the safe, contributed to the theft, and we contend that it is not a permissible inference that the theft was perpetrated by reason of the postmaster's neglect to do any of these things. There is no license to say that if the safe had been fully locked and the combination changed, the theft would not have occurred.

Take whatever duty you please, which it is shown the postmaster omitted, and we challenge respondent to point out any evidence which would justify the inference that the theft resulted therefrom. The cold fact stands out that plaintiff had no evidence whatever to prove that the postmaster's neglect of duty had anything to do with the theft. Nobody knew how the theft occurred or who committed it. The jury were permitted to assume that the postmaster's neglect of duty must have occasioned the loss since the loss could not be otherwise accounted for. Such a verdict was based upon surmise and suspicion, and nothing more.

We submit that in this situation the jury should have been directed to return a verdict for the defendants.

Consider, secondly, the proposition that the theft took place in the Fairbanks office. Here, again, the burden of proof rested upon the plaintiff, and no judgment against the postmaster or his surety

was warranted if this burden was not met. We submit that it was not met.

The evidence produced on plaintiff's behalf showed the history of the package from the time it was made up in the First National Bank at Fairbanks on the afternoon of September 15th until it was opened at Nenana on the evening of September 16th. The evidence showed how the package was transported. The various persons who had it in charge testified as to their care of it. From this evidence the inference was sought to be drawn that no depredation was or could have been made upon the package after it left the Fairbanks office, consequently, according to the theory of plaintiff, the theft must have occurred there.

An examination of the evidence bearing upon the question of where the theft took place will show that it was altogether circumstantial, and was as consistent with the theory that it occurred outside of the post office as with the theory that it occurred inside the post office; and it is the contention of petitioners that since the evidence tends equally to sustain the two inconsistent propositions, neither of them was established by legitimate proof, and that the verdict in favor of the plaintiff, upon whom the burden of proof rested, was essentially wrong.

There was no direct evidence that the package was rifled while it reposed in the post office. There was no evidence that any person not a sworn employee of the postmaster, other than E. A. Hering,

was in the office at any time while the package was there. There was no evidence that the post office was broken into. There was no evidence that any doors or windows remained unlocked or open when the sworn employees were not present. There was no evidence that the safe in which the package was placed had been tampered with. There was no evidence of any kind that either the office or the safe had been burglarized.

There was evidence, admitted over defendants' objection, that a stock of old magazines was in the office, but there was no evidence that the magazine found in the package when it was opened was among this stack, or that it was ever in the Fairbanks office. There was evidence, admitted over defendants' objection, that a box of nails of miscellaneous sizes, some of the kind with which the broken canvas sack was fastened, was on a shelf in the office, but there was no evidence that the nail found in the sack was ever in the Fairbanks office.

It was conceded that Hering was in the office for about fifteen minutes around eight o'clock on the evening of September 15th. The undisputed evidence is that he was not then a sworn employee, but that up to a month prior thereto he had been, and that on this occasion he entered the office with the postmaster's consent and knowledge and by means of the postmaster's key for the purpose of dispatching certain mail. The uncontradicted testimony is that Hering was in the habit of assisting in the work after he ceased to be a regular em-

ployee, and that after ceasing to be such employee he assisted in familiarizing his successor (Miss Smith) in the performance of her duties. These services were performed by him gratuitously and at the postmaster's request.

Quite obviously it was possible for Hering to commit the theft. It was equally possible for one of the regular employees, either Miss Houck or Miss Smith, to commit it. It was equally possible for the assistant postmaster, W. W. Clark, to commit it. It was possible for the postmaster himself to commit it. All of these persons had access to the package. The plaintiff made no contention, however, that either of these persons was the thief, nor was any evidence attempted to be adduced to connect either of them with the crime.

While there was no evidence tending to show that the theft took place in the office, there was some evidence to show that it did not take place there. The testimony of Miss Smith was that the package, when it was placed in the mail pouch on the morning of September 16th and sent to the train, was in the same condition as when it was received from the bank. It was she who placed the package in a registered jacket. In doing so she tore the corner of the jacket slightly, as the package made a very tight fit. After putting the package in the jacket she bound it around with twine and placed it in the safe. It was she who took the package from the safe on the morning of the 16th and placed it in the mail pouch. When

she took it from the safe she found it in the position where she had left it the previous afternoon. It was wrapped just the same. The torn corner of the jacket was just the same. There was nothing to indicate to her that the package had been touched while it reposed in the safe. A very significant fact was that when the package arrived at Nenana the tear in the jacket was much larger than when it left the Fairbanks office.

The foregoing are circumstances strongly indicating that no depredation upon the package was made prior to the time that it left the Fairbanks office. The most that can be said in support of the contention that the theft occurred in the Fairbanks office is that by virtue of the accessibility of the package to Hering and the office employees and officials, it was possible for one of them to commit the theft. The evidence further shows, however, that the package was equally accessible to other persons after it left the Fairbanks post office and while it was in the course of transmission to Nenana.

As pointed out in our opening statement of facts, the pouch into which the package was placed for transmission was an ordinary iron-lock pouch. It was proper to use such a pouch for registered mail. The same key unlocks all pouches of that kind, and every postmaster has such a key. This lock can be picked without much difficulty. The mail was carried in an unguarded freight car. This car, with the mail therein, stood unguarded for nearly an hour before the train left Fairbanks on the

morning of September 16th. Freight from this car was unloaded at different points en route. While all hands were engaged in extinguishing a fire which broke out during the trip, and while the train was surrounded with smoke, the mail in the freight car remained unprotected. There was ample opportunity for a thief to rifle the mail while it was being transported. During all of this time the mail, and this registered package in particular, was as accessible to the various members of the train crew, and to any other person who entered the car, as it was to any person in the Fairbanks office. The doors of the freight car carried no locks, but were merely hooked on the outside.

To preclude a supportable verdict in favor of the plaintiff it was enough that the evidence showed accessibility of the mail to persons outside of the postoffice equally with persons within the office, and this the evidence did show indisputably. It was readily accessible to the conductor and to the two brakemen. The presumption of innocence, which would protect the members of the train crew from the charge of theft of the contents of the package in the absence of satisfactory evidence that either of them was guilty, did not warrant the inference that some person committed the theft in the Fairbanks office.

The Circuit Court of Appeals for the Eighth Circuit had occasion, in the case of *United States Fidelity & Guaranty Co. v. Des Moines National Bank*, 145 Fed. 273, to express views in accord with

our contention here. In that case one Kelley, the regular receiving teller of the bank, was acting as paying teller during the temporary absence of the regular paying teller. A reserve chest in the bank's vault contained cash from which the paying teller replenished the counter money. This chest was as accessible to the other employees of the bank as it was to Kelley. It was a part of Kelley's duties to count the contents of this chest at the close of each day's business. He neglected to do so. When the regular paying teller returned, the chest was found to be $5000 short. The bank sued Kelley and his surety and obtained judgment. On writ of error the Circuit Court of Appeals reversed the judgment, holding that a verdict should have been directed in favor of the defendants. In criticising an instruction to the effect that the jury were warranted in finding that the loss occurred by reason of Kelley's negligence, notwithstanding that the evidence did not disclose the particular way the money was lost, the appellate court said:

> "Thus the charge proceeded, upon the view that, while the matter of when and how the loss occurred and what became of the money was not shown but left to conjecture, Kelley's relation to the money, his control over it, and his custody of it, were such that the jury would be justified in inferring that the loss, because not shown to be otherwise, was in some way or other the result of culpable negligence on his part. Essentially the same idea is expressed by counsel for the bank, when they say:
>
> 'We contend that by the manner of procedure in this bank, and the system of accounting in vogue in this bank, we have shown con-

clusively that Kelley got the money and can't tell what became of it, and so his bond is liable unless they show what became of it.'

"We cannot concur in that view. It presupposes that the reserve cash was within the control and custody of Kelley, and applies to him the rule applicable to a bailee or other custodian whose situation is such that a loss, if not otherwise explained, warrants the inference that it was due to his negligence or dishonesty. Kelley occupied no such relation to this money. He could take from it to replenish the counter cash and add to it from the latter, and it was his duty to count it at the close of business each day, and then to lock the safe; but, in other respects, it was not within his control or custody. It was the cashier, and not Kelley, who carried the combination to the lock, who could say whether the reserve chest should be kept locked or unlocked during business hours, and who could otherwise take measures for the safety of the money. When Kelley was attending to his important duties in the paying teller's cage, as was required most of the time, the reserve chest and its contents were beyond the range of his observation, the chest was unlocked, and its contents were easily accessible to other employees, over whom he had no control, and who were passing in and out of the vault, and sometimes out of the bank, without any immediate supervision of their movements. True they had no right to disturb the money, but that was not an assurance that none of them would yield to the temptation which the situation presented; nor does the presumption of innocence, which would protect them from the charge of theft in the absence of satisfactory evidence thereof, warrant the inference that Kelley was either negligent or dishonest. Smith v. First National Bank, 99 Mass. 605, 97 Am. Dec. 59. Such an inference cannot be

legitimately drawn from a rebuttable presumption, but only from premises which are certain.

Passing, for the moment, the fact that Kelley neglected to make a daily count of the money in the reserve chest, it is plain that the evidence bearing upon the cause or occasion of the loss was altogether circumstantial, and was as consistent with the theory that the loss was occasioned solely by the personal dishonesty of one of the other employees, to whom the money in its exposed condition was easily accessible, as with the theory that it was occasioned by the personal dishonesty or culpable negligence of Kelley. Which theory was correct was left to mere conjecture. The bank had the burden of proof, and, as it failed to produce any evidence reasonably tending to establish the latter theory to the exclusion of the other, the guaranty company was entitled to a directed verdict in its favor."

The court then quotes with approval from *Asbach v. Chicago etc. Ry. Co.*, 74 Iowa 248, 37 N. W. 182, as follows:

"A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, merely, with that theory, for that may be true, and yet they may have no tendency to prove the theory."

Referring to the decision in *Smith v. First National Bank*, 99 Mass. 605, 97 Am. Dec. 59, the court says:

"The case of Smith v. First National Bank is well in point. It was an action to recover

the value of bonds deposited with the bank for safe-keeping and alleged to have been lost through its negligence. There was no evidence of negligence, except that which resulted by inference from the fact of loss, and the surrounding circumstances were such as to leave it equally open to inference that the bonds had been stolen by one of several persons who had access to the vault in which the bonds were kept. For a loss in the latter mode the bank was not responsible. The court, after observing that the plaintiff had the burden of proof, and that its evidence failed to exclude the possibility of loss by other means than negligence of the defendant, and left the case to be decided by mere inference, without any facts to determine which inference was correct, said:

'There being several inferences deducible from the facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of these propositions against the other is essentially wrong'."

In the case of *Neal v. Railway Co.*, 129 Iowa 5, 105 N. W. 197, it is said:

"If other conclusions may as reasonably be drawn as to the cause of the injury from the facts in evidence than that contended for, the evidence does not support the conclusions sought to be drawn from it. Verdicts must have evidence to support them, and the jury will not be permitted merely to conjecture how the accident occurred. * * *. If it appears that the facts and circumstances from which

> a conclusion is sought to be deduced, although consistent with that theory, are equally consistent with some other theory, they do not support the theory contended for."

The rule above stated, as distinguished from the view that it is sufficient for the party having the burden of proof to make out the more probable hypothesis, is accepted by a majority of the authorities. In addition to the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *United States Fidelity & Guaranty Co. v. Des Moines National Bank*, supra, and the other cases above mentioned, the rule that a conclusion is not supported by circumstantial evidence unless the facts relied on are of such a nature and so related to each other that no other conclusion can fairly or reasonably be drawn from them, is supported by the following, among many other, cases:

Georgia R. etc. Co. v. Harris, 57 S. E. 1076 (Ga.);

Ohio Bldg. Safety Vault Co. v. Illinois Industrial Bd., 115 N. E. 149 (Ill.);

Cleveland etc. R. Co. v. Starks, 106 N. E. 646, 653 (Ind.);

Reynolds v. Maryland Casualty Co., 201 S. W. 1128 (Mo.);

Britt v. Omaha Concrete Stone Co., 156 N. W. 497 (Neb.);

Moscato v. Prince Line, 150 N. Y. S. 225;

Marquet v. Aetna Life Ins. Co., 159 S. W. 733 (Tenn.);

McDonald v. Provident etc. Soc., 84 N. W. 154 (Wisc.).

We contend that in a case like the present, where the place of loss was unknown, and where all of the known facts were inconsistent with the theory of loss in the Fairbanks office, there being no evidence of forcible entry, no evidence of tampering with the safe, no evidence of any kind of a burglary, but on the contrary there being evidence that the package left the office in the same condition as when it was received, the rule adopted by the foregoing authorities should be applied here. The inference that the theft took place on board the train, either before the train left Fairbanks, or after the train left Fairbanks, is just as fair and reasonable as the inference that it took place in the office. That being so, we submit that no verdict or judgment in the plaintiff's favor was warranted.

It should be apparent that the circumstance of the existence in the Fairbanks office of a stack of old magazines and a box of miscellaneous nails, some of which were similar to the nail found in the rifled package, fell short of constituting legitimate proof of theft in that office, since there was no proof that either the magazine or the nail was ever in that office. We submit that before the circumstance of the existence in the office of a stack of old magazines and of a box of nails could be considered as proof of theft in the office, it was incumbent upon plaintiff to prove that the particular magazine and the particular nail found in the package when it was opened were actually in the office on the night of September 15th when it is claimed the theft occurred. In permitting plaintiff to introduce evi-

dence of the existence in the office of a stack of old magazines and a box of miscellaneous nails, the court permitted the plaintiff to attempt to prove that the theft occurred in the office by conjectural circumstances. (Assignments of error 51 and 57.) The rule is well settled that where circumstantial evidence is relied upon, the circumstances must be proved and not presumed.

> "We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proved."
>
> *Manning v. Insurance Co.*, 100 U. S. 698.

> "Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed. * * *. The law requires an open and visible connection between the principal or evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. *A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption.* There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption." (Italics added.)
>
> *United States v. Ross*, 92 U. S. 281.

There being no evidence even remotely tending to prove that the theft was proximately caused by

any negligent act of the postmaster, and the circumstances shown relative to the place of loss being as consistent with the theory that the loss occurred outside of the office as with the theory that it occurred within the office, we submit that the jury should have been directed to return a verdict for the defendants. (Assignments of error 3 and 4.)

V.

COSTS IMPROPERLY TAXED AGAINST PETITIONERS.

After judgment was rendered, plaintiff filed a memorandum of costs and disbursements in the sum of $3,098.45. (R. 428-431.) Exceptions thereto were filed by defendants (R. 432-436), none of which were allowed by the clerk. Defendants appealed to the court from the order of the clerk taxing said costs as rendered, specifying the items which they claimed were not legally chargeable as costs in the case. These items are set forth on pages 438-441 of the Record. The trial court sustained defendants' objections to items aggregating $61.60, but disallowed all other objections, and taxed plaintiff's costs in the sum of $3,036.85. (R. 445-446.) Exceptions were duly taken to the various items allowed over defendants' objections. These exceptions are set out on pages 446-449 of the Record, and are covered by assignments of error numbers 74-76.

The witness A. H. Keller was allowed witness fees for 32 days at $4.00 per day and mileage for 940 miles at 15¢ per mile, and for 3680 miles at 5c per

mile, a total of $453.00. Defendants contend that fees should have been allowed for only such days as the witness was actually in attendance at the trial (the entire trial consumed only 3 days) and two days to travel 200 miles, and mileage for only 200 miles.

Defendants make the same contention as to the witness L. A. Fairborn, who was allowed fees for 8 days and mileage for 244 miles; as to the witness Frank Doner, who was allowed fees for 36 days and mileage for 4880 miles; as to the witness George Bentley, who was allowed fees for 34 days and mileage for 4880 miles; as to the witness Mrs. E. A. Williams, who was allowed fees for 10 days and mileage for 712 miles; as to the witness P. O. Wrangstedt, who was allowed fees for 28 days and mileage for 4994 miles, and as to the witness W. B. Raeburn, who was allowed fees for 34 days and mileage for 7338 miles.

Defendants also contend that the allowance of fees and mileage in any amount whatever to the witness James Hagan was not warranted, since he was a Deputy United States Marshal who was paid nothing for his attendance and who travelled on a pass on the government railway. That this witness travelled on a pass, and that plaintiff paid him nothing as witness fees, is shown by the stipulation set out on pages 443-445 of the Record. We submit that under these circumstances defendants could not be legally assessed for any costs on account of this witness. The amount allowed on his account was $37.70, $17.70 for mileage and $20.00 for witness fees.

As to the other items complained of and mentioned above, the question presented is whether plaintiff was entitled to recover mileage for its witnesses greater than the distance that could be reached by subpoena, namely, 100 miles, and fees in excess of the number of days actually in attendance, plus the number of days consumed in travelling the distance for which mileage is allowable.

By the stipulation just referred to it is shown that the plaintiff, before subpoenaing the witnesses named, all of whom were subpoenaed more than 100 miles from Fairbanks, did not make application to the court showing that the testimony of said witnesses was material, or that their testimony was important or desirable. It is further shown, by said stipulation, that the court did not endorse on the subpoenas an order for the attendance of the witnesses.

Section 1462 of the Compiled Laws of Alaska reads:

> "A witness is not obliged to attend for oral examination or otherwise at a place distant more than one hundred miles from the place where he resides or at which he may be served with a subpoena; except that, in an action or proceeding pending in a court of record, the court or judge thereof, upon the affidavit of the party or someone on his behalf, showing that the testimony of the witness is material and his oral examination is important and desirable, may indorse upon the subpoena an order for the attendance of the witness; and service of such subpoena and order and payment of legal fees to the witness are sufficient to require his attendance, if he be served within the district."

Plaintiff did not comply with these provisions, and as the witnesses mentioned were served without the district and at a distance of more than 100 miles from the place of trial, their testimony must be deemed to have been voluntary.

In the case of *United States v. Southern Pacific Co.*, 230 F. 270, Judge Trippet says:

> "In 1871 Judge Sawyer in the Circuit Court for the District of California (Spaulding v. Tucker, 2 Sawy. 50, Fed. Cas. No. 13,221), held that a subpoena served without the district and at a place more than 100 miles distant from the place of holding court had no potency, and that a witness who attended from beyond the district, and more than 100 miles distant from the place of holding the court, attended voluntarily. This decision is well supported by authority existing at that time and by many decisions rendered since, and it will be followed in this case."

Judge Bean, of the United States District Court of Oregon, in the case of *United States v. Southern Pacific Co.*, 172 F. 909, says:

> "The extent to which the prevailing party in a civil action may charge against his adversary mileage fees of witnesses who attended the trial on his behalf is a subject of much conflict in the federal decisions. The question has not been authoritatively decided by the Supreme Court or the Court of Appeals, so far as I am advised. In some jurisdictions it is held that the successful party is entitled to the mileage of his witnesses, regardless of the place of their residence, or whether they came from or out of the district, and whether they attended in obedience to a subpoena or at the request of the party. United States v. Sanborn (C. C.) 28 Fed. 299. In others it is held that since section

863, Rev. St. (U. S. Comp. St. 1901, p. 661), provides for taking the deposition of a witness residing more than 100 miles from the place of trial, the clerk has no authority to allow mileage for a witness residing at a greater distance, whether within or without the district. Smith v. Chicago & Northwestern R. Co. (C. C.), 38 Fed. 321. The rule, however, supported by the great weight of authority is that the prevailing party in a civil action is entitled to charge, as part of his costs, mileage for the distance necessarily traveled by a witness to attend the trial on his behalf from any place to which a subpœna will run; that is, from any point within the district or from any point out of the district and not exceeding 100 miles from the place of holding court."

In the recent case of *Kirby v. United States*, 273 F. 391, Judge Gilbert, speaking for the Circuit Court of Appeals for the Ninth Circuit, says:

"In United States v. Southern Pac. Co. (C. C.), 172 Fed. 909, Judge Bean followed the ruling in Hanchett v. Humphrey. In United States v. Southern Pac. Co. (D. C.), 230 Fed. 270, Judge Trippet held likewise. In neither of the last two cases was mention made of the decision of this court in Jesse D. Carr Land & Live Stock Co. v. United States, 118 Fed. 821, 55 C. C. A. 433, in which Judge De Haven, speaking for the court, said:

'The appellant's motion to strike from the bill of costs the amount claimed by the appellee for mileage and fees of certain witnesses, who came from without the state and more than 100 miles from the place of trial, was properly denied.' Citing United States v. Sanborn (C. C.), 28 Fed. 299.

Upon that decision the plaintiff in the present suit relies. We are of the opinion that the

> remarks of the court in that case should not be held decisive of the question here involved. The ruling was made, not on a motion to retax the costs, but on a motion to strike out the costs taxed as mileage and for expenses of witnesses. It does not appear that the question whether or not the witnesses were entitled to mileage for more than 100 miles was presented or discussed. Judge Hawley participated in the decision, notwithstanding his prior ruling in Hanchett v. Humphrey. We think it should not stand in the way of adopting the rule which is sustained by the weight of authority, as well as by the weight of reason, that mileage is taxable in the federal court only for the distance that could be reached by a subpoena, and we so hold."

In the case of *Morris-Turner Livestock Co. v. Director General of Railroads*, 266 F. 600, Judge Bourquin says:

> "The federal law of costs is fragmentary and indirect. Section 983, R. S. (Comp. St. Sec. 1624), which is merely declaratory of the law aside from it, provides certain costs shall be taxed against the losing party 'where by law costs are recoverable in favor of the prevailing party'.
>
> The law therein referred to is the law administered in federal courts; that is, federal law, and also state law, in so far as the latter is not inconsistent with the former."

If the trial court, in the trial of the case at bar, was sitting as a federal court, the rule as to costs adopted in the Ninth Circuit, as expressed in the *Kirby* case, supra, applies, namely, that mileage is taxable only for the distance that could be reached by a subpoena. On the other hand, if the trial court was sitting as a territorial court, the subpoena could

not reach to a distance of more than 100 miles unless procured in the manner provided by Section 1462 of the Compiled Laws of Alaska. The subpoenas here were not so procured. It follows, therefore, that there was no warrant for the allowance of the fees and mileage claimed on account of the mentioned witnesses.

We do not overlook the ruling of the Supreme Court of Oregon, on a statute similar to Section 1462 of the Compiled Laws of Alaska, that unless a losing party avers, when objecting to a claim for mileage on account of a witness attending voluntarily, that oral examination of the witness was unimportant or unnecessary, it is not error to allow such disbursements. (*Spencer v. Peterson*, 68 Pac. 1108.) A mere rule of procedure should not be so inflexible as to work injustice. It will be observed that all that is required, under this rule, is an averment as a conclusion that oral examination was unimportant or unnecessary. Such an averment does not assist the trial court in determining whether the objection is good, nor does it assist the appellate court in reviewing the trial court's order. All that is to be considered, by either court, is the testimony itself. If it appears from the testimony of a witness that the testimony could have been introduced by deposition just as well as by having the witness present at the trial, costs incurred in bringing him an excessive distance should not be allowed. Take as an illustration the testimony of the witness Keller. Plaintiff brought him from Seattle to testify that he was the freight

clerk who received the mail pouch from Lillico; that the pouch was closed and locked; that he handed it to Nordby in the freight car in that condition; that it was in his custody only a couple of minutes and that no other person touched it during that time. This testimony makes up only two pages of the Record, pages 90-92. We submit that it was unreasonable to bring a witness such a distance, and at an expense of $453, to give testimony of this character when his deposition could have been taken. An examination of the testimony of the other witnesses brought from an extreme distance will disclose a like situation.

It is to be noted, however, that the rule of practice just discussed applies only if it may be said that the trial court when trying the cause was sitting solely as a Territorial Court. We submit that it cannot be said that the trial court was so sitting. The cause before the court involved the responsibility of an employee of the United States. The case was not prosecuted under Alaska laws, but under federal statutes and regulations of the Post Office Department. In subpoenaing witnesses plaintiff disregarded the Alaska laws. In this situation, and in view of the fact that the trial court is of a dual nature, namely, a United States District Court and a Territorial Court, we submit that the rule relative to costs adopted in the Ninth Circuit, as expressed in *Kirby v. United States*, supra, should control.

The Circuit Court of Appeals held that Section 1462 of the Compiled Laws of Alaska was to be

construed as the Supreme Court of Oregon construed a similar statute, namely, that the adverse party is not entitled to complain of the failure to indorse on the subpoena an order requiring the attendance of the witness; that if the witness attends, he is entitled to his mileage and per diem, but that his per diem is limited to the days he is in attendance at the place of trial. To the extent that the plaintiff was allowed costs covering per diem of the witnesses in coming and going, the Circuit Court of Appeals reversed the judgment, but in other respects affirmed it. We submit that all of our exceptions with reference to the matter of costs are well taken.

Upon the grounds hereinabove set forth, we submit that the judgment and order of the trial court and of the Circuit Court of Appeals should be reversed.

Dated, San Francisco,
March 31, 1927.

Respectfully submitted,
LOUIS S. BEEDY,
Attorney for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 1138

T. H. DEAL AND UNITED STATES FIDELITY & GUARANTY COMPANY of Baltimore, Maryland, Petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The case was tried to a jury, and the charge of the District Court is found at page 373 of the Record. The opinion of the Circuit Court of Appeals has not been reported, but appears at page 539 of the Record.

JURISDICTION

The judgment sought to be reviewed was entered by the Circuit Court of Appeals for the Ninth Circuit on February 15, 1926, affirming a judgment of

the United States District Court for the Territory of Alaska entered upon the verdict of the jury on March 3, 1925. The jurisdiction of this Court to issue the writ is found in Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 936.

THE QUESTION

This case presents a controversy respecting the liability of a postmaster and the surety on his bond for loss of the contents of a registered package while in his custody, where the package contained money belonging to the United States, and whether under such circumstances the postmaster is liable as an insurer on the theory that the money constitutes public funds of the United States entrusted to his care, or whether his liability must be founded on negligence, as would be the case if the registered package did not belong to the United States.

STATEMENT

The petitioner, Deal, was the postmaster at Fairbanks, Alaska. On the afternoon of Thursday, September 15, 1921, an officer of the First National Bank of Fairbanks delivered to the register clerk at the Fairbanks post office a package to be registered and mailed to the special disbursing agent of the Alaska Engineering Commission. This package contained $9,900 in currency and $37.65 in silver, which the officers of the bank had inclosed in wrapping paper and placed in a canvas

sack, such as is ordinarily used for shipment of money. The sack was tied with twine and sealed by the officers of the bank. (R. 53.)

The Alaska Engineering Commission was a governmental agency, and the funds under its control were moneys belonging to the United States, and the money in this package represented the proceeds of certain checks cashed by the special disbursing agent of the Commission out of funds belonging to the United States in his possession as a matter of accommodation, and which checks had been sent to the First National Bank by the disbursing agent to be cashed, with instructions to send him the proceeds in money. The money in the registered package became the property of the United States on delivery of the package by the bank to the post office for transmission to the disbursing agent.

The register clerk, Miss Houck, testified she thought the package contained money, but was not sure. The package was mailed on a mail frank without postage, indicating that it was sent on Government account. The register clerk placed it in a basket beside her (R. 55), and then another post-office clerk, Miss Smith, took possession and placed it in another basket about 3.30 p. m., where it remained an hour or so. (R. 62.) Miss Smith placed the sack in a paper jacket or container, around which she tied a string, and in the late afternoon of September 15th placed the package in

a small safe in the post office, and placed the safe on the day combination. (R. 65.) This meant that, without knowledge of the full combination, turning the combination handle two or three points would enable anyone to open the safe. The next morning, September 16th, Miss Smith opened the safe, finding it still on the day combination. (R. 65.) She took the package and in the presence of the postmaster without removing the paper container so as to examine the condition of the sack, placed it in a mail sack, which was locked and sent by rail to Healy, Alaska, to which it was addressed. On arrival at Healy, it was found that the canvas sack which the bank had used in which to ship the money, had been slit at the bottom, the currency extracted, and replaced with a magazine.

There was evidence from which the jury were justified in finding that the currency had been stolen while the package was in the post office at Fairbanks, and the jury did so find, because whatever other inconsistencies there were in the charge of the trial court it consistently charged that no recovery could be had unless the loss occurred in the Fairbanks post office.

Various Post Office Regulations were relied on at the trial respecting the care of property by a postmaster, the failure to comply with which was urged as ground for holding the postmaster and his surety responsible. The charge of the trial

court is somewhat confusing. The trial judge attempted to submit the case to the jury on three different theories.

One theory was that the postmaster could be held liable for the loss of money only if guilty of negligence as the result of which the loss occurred. In charge No. 13 (R. 392) the court charged that unless the jury found—

> the loss was occasioned by his carelessness or negligence by reason of his disregard of the law or regulations * * * your verdict must be for the defendants.

And in charge No. 15 (R. 394) it said that the failure of a postmaster, which produces a loss, to observe the regulations renders him liable for loss of registered matter. In charge No. 16 (R. 395) it dealt again with the case on the basis of negligence.

Another theory on which part of the charge was based was that to hold the postmaster liable it must appear that he violated some regulation respecting the care of the registered package, but that it was not necessary to show that the violation of the regulation was the approximate cause of the loss. Such a theory is reflected in charge No. 21. (R. 398.)

A third theory was that the money in the registered package, being the property of the United States, constituted public funds entrusted to the

postmaster's care, for the loss of which he would be absolutely liable as an insurer, in the same way that he would be liable for loss of funds representing the sale of stamps or money orders. This theory was presented to the jury in charge No. 22. (R. 399.) It must be admitted that the charge of the trial court involves apparent inconsistencies.

There was evidence to justify a finding that proper care had not been used in protecting the package from theft while in the Fairbanks post office, and if the case had been submitted to the jury on the ground that the postmaster would be liable if negligence were shown which caused the loss, the verdict could readily be sustained.

The Circuit Court of Appeals rejected the theory that in order to hold the postmaster liable it must appear that he was guilty of negligence causing the loss, and also rejected the theory that he would be liable absolutely to the insurer on the ground that the moneys constituted public funds in his charge, but accepted the view that if the postmaster failed to comply with the post office regulations respecting the care of the package, and the contents were lost or stolen while in his custody and while he was failing to comply with the regulations, he would be liable without regard to whether the loss was occasioned by or resulted from the failure to comply with the post office regulations.

ARGUMENT

I

THE POSTMASTER'S BOND COVERS A LOSS OF REGISTERED MAIL

The first point which suggests itself is whether the postmaster's bond was intended to cover loss of registered mail, whether or not owned by the United States. The bond runs to the United States as obligee. Its condition was (R. 375)—

> That if the said Thomas H. Deal shall faithfully discharge all duties and trusts imposed on him as postmaster either by law or by the regulations of the Postoffice Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulations made pursuant to law, in connection with the Postal Savings System, then this obligation shall be void.
> * * *

Even though neither the bond nor any statute or regulation provide expressly that the bond shall inure to the benefit of any person sending registered mail, the law seems to be settled that the United States may maintain an action on such a bond to recover for the loss of registered mail matter belonging to private citizens, and in such

an action may recover the full value of the property lost, and not merely the amount for which the United States may be liable, the proceeds of the suit to be turned over to the person suffering the loss.

National Surety Co. v. *United States,* 129 Fed. 70.

United States v. *American Surety Co.,* 155 Fed. 941.

Gibson v. *United States,* 208 Fed. 534.

United States Fidelity & Guaranty Co. v. *United States,* 229 Fed. 397.

United States Fidelity & Guaranty Co. v. *United States,* 247 Fed. 16.

If a suit may be maintained by the United States on such a bond to recover the value of loss of registered mail belonging to a citizen, there seems to be no reason why the United States may not maintain a suit on the bond for its own benefit where it happens to be the owner of the contents of a registered mail package.

II

THE REGULATIONS BEARING ON THE QUESTION WHETHER THE POSTMASTER'S LIABILITY TO THE UNITED STATES FOR LOSS OF REGISTERED MAIL BELONGING TO THE UNITED STATES DEPENDS ON NEGLIGENCE OR IS THAT OF AN INSURER, ARE NOT CLEAR, BUT ARE FAIRLY SUSCEPTIBLE OF THE CONSTRUCTION THAT NEGLIGENCE CAUSING THE LOSS MUST BE SHOWN

The feature about this case which has caused difficulty is that the moneys lost were not public

funds entrusted to the postmaster for the conduct of his office or arising through the operation of his office, such as proceeds of stamps or money orders sold, and which he was therefore bound to account for to the United States, but the money came into his hands in the form of a registered package sent through the mails in the ordinary way, by a bank to an officer of the United States.

Section 3846 of the Revised Statutes of the United States provides:

> Postmasters shall keep safely, without loaning, using, depositing in an unauthorized bank, or exchanging for other funds, all the public money collected by them, or which may come into their possession, until it is ordered by the Postmaster General to be transferred or paid out.

Under that section no doubt the postmaster would be absolutely liable for loss of public funds such as are described in it, unless he could obtain relief under some statutes which allow relief to be given to him by administrative officers of the Government on proof that he was not at fault. As said by the Circuit Court of Appeals (R. 544), that statute has no application to this case.

Section 940 of the regulations of the Post Office Department provides (R. 546):

> Postmasters and other postal employees will be held personally responsible by the Post Office Department for the wrong delivery, depredation upon, or loss of any reg-

> istered letter or parcel if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations.

If liability rests on this regulation, it is evident that negligence or disregard of the regulations must be established, and it must also appear that the loss was due to such negligence or violation of regulations.

The other section of the Postal Regulations is Section 291, which is found in the regulations under the head of "Miscellaneous Provisions," and is as follows:

> When a post office has been robbed, the postmaster shall immediately report all the facts to the Chief Inspector and to the post-office inspector in charge of the division in which the post office is located. (See sec. 35.) The report should give, if possible, all the circumstances connected with the robbery, the date, a detailed inventory of the loss, the denominations of stamped paper stolen, the amount of postal and money-order funds and of each class of Government property. The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the property. If the loss includes the mail key the number should be given. (See sec. 1527.) Full particulars regarding registered mail lost or rifled should be reported. The Chief Inspector shall promptly notify the Assistant Attorney General of every such casualty

> from which a claim for credit under the provisions of section 150 may arise.
>
> 2. All subsequent developments shall be reported to the same officers.
>
> 3. Brief telegraphic report of the robbery of a post office should also be made when practicable to the post-office inspector in charge of the division in which the post office is located (see sec. 35), the telegram to be sent "collect" and indorsed, "Official business, collect Government rate."

That section deals particularly with robbery. The clause—

> The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the property—

may refer only to the loss of postal funds and money order funds and other like classes of Government property in his possession, or it may refer as well to registered mail. It is also somewhat ambiguous in not stating whether liability for the loss exists if the failure to exercise due care in the protection of the property did not produce the loss. It may mean that a failure to properly protect the property, followed by a robbery at the time such failure exists or continues, is sufficient to hold the postmaster responsible, although there is no direct proof that the failure to use due care produced the loss. This is a possible view, as the exact circumstances of robberies are rarely known. The Circuit Court of Appeals held that Section

291, relating to robberies, applied to the case; that the clause relating to the responsibility of the postmaster for loss applied to registered mail as well as to Government property entrusted to him in the way of postal and money-order funds, and also held, in substance, that Section 940, relating generally to the loss of registered mail and providing for liability of the postmaster for loss due to his negligence or disregard of the regulations, did not make proof that the negligence caused the loss necessary in the case of robbery dealt with by Section 291; and finally it construed Section 291 to mean that the postmaster should be responsible if he failed to use due care in the protection of the property and if it were stolen while he was failing to use such due care, notwithstanding absence of evidence to show that the loss resulted from the negligence.

The trial court had difficulty in applying its view that the postmaster was absolutely liable for loss of registered money belonging to the United States on the theory that it constituted public funds, and realizing that theory would not be workable, unless at least the postmaster knew that he had public funds in the registered mails, charged the jury that to hold the postmaster liable as an insurer of public funds they must find that he knew that this package contained money belonging to the Government.

The theory that the postmaster is absolutely liable as an insurer for loss of a registered package

containing money belonging to the United States, although only liable for loss of private mail where his negligence causes the loss, must be rejected, as the Circuit Court of Appeals rejected it, and the 22d charge of the trial court applying that view was erroneous. The Circuit Court of Appeals held that this error was without prejudice (R. 549, 550), because it conclusively appeared and was admitted that the postmaster violated the regulations respecting the care of the registered package, and holding, as it did, that mere proof of violation of the regulations respecting the care of the package, without any evidence to connect the violation of regulations with the loss, was sufficient to impose liability on the postmaster, it sustained the judgment of the trial court.

As we have endeavored to point out, there is at least room for argument whether, under Section 940, relating to registered mail and providing for liability for loss due to negligence, and under Section 291, relating generally to robberies, the regulations were intended to do more than hold the postmaster responsible for loss of registered mail or loss resulting from robberies where the postmaster's negligence was the approximate cause of the loss.

The Postal Regulations suggested by the Circuit Court of Appeals to have been violated by the postmaster were the following (R. 542, 543.)

> SEC. 361. (4) Where stamps and funds are kept in iron safes with "combination

> locks," such safes shall be carefully and completely locked at night or when the office is left without occupants. No credit will be allowed for losses from safes fastened only with what is termed a " day lock " or " day combination."
>
> A postmaster upon taking charge of his office shall immediately change the combination on every safe therein; and where at any time a safe is procured, either new or second-hand, he shall immediately change the combination. Failure to make such change shall be considered as *prima facie* evidence of contributory negligence on the part of the postmaster in any case where claim is made for credit for money or other property stolen from such safes which have been opened without resort to violence.

That section starts with the provision—

> Postmasters must exercise all possible care for the protection of the public funds and property in their custody.

Section 361, Postal Laws and Regulations, 1913, which is in Chapter 8, entitled " Care of Public Funds and Property," follows Section 360, which is a copy of Section 3846 of the Revised Statutes, quoted above, requiring the postmaster to safely keep public funds and which plainly does not apply to registered mail. Consequently Section 361, respecting the day combination and the changing of the combination, had no application to the case

of registered mail, unless there be some other regulation requiring registered mail to be kept in such a safe.

Paragraph 20 of the 1920 Postal Guide (R. 294) provides:

> Registered articles known or presumed to contain large values, such as coin, currency, securities, etc., to be made the object of special care, in so far as practicable, both at postoffices and while in transit. Such articles, as far as practicable, should be given proper vault or safe protection, handled under the supervision of responsible supervisory officials or employees, and such receipts should be taken and care exercised in billing and checking as will make it possible to place responsibility in cases of loss or depredation.

That regulation says nothing about combinations of safes, but it does require registered articles presumed to contain large values to be given proper vault or safe protection, and placing a valuable money package in an iron safe on a day combination over night, so that any one of a number of postal employees could open the safe or any one ignorant of the combination could open by merely turning the dial a few points to the right, was not proper safe protection, so that the Circuit Court of Appeals was right in saying that a violation of the regulations had occurred with respect to the care of this registered package.

There was also a violation of Section 524 of the Regulations (R. 543) in allowing one not an employee of the department to have access to mail matter. A man formerly employed in the post-office was allowed to enter it the evening of September 15th to get some mail and to dispatch some in the outgoing sacks.

The jury found that the money was lost in the Fairbanks post office. The record shows conclusively a failure to comply with the regulations respecting the care of the package, and that while the package was so improperly cared for the money was stolen. This seems to narrow the case down to the single question whether, under regulations 291 and 940, a postmaster may be held liable for theft of the contents of a registered package while it is in his custody and not guarded as required by the regulations without any proof that the negligence or failure to obey the regulations caused the loss or brought about the theft.

On the evidence in this case it is obvious that the jury would have been justified in finding that the contents of the package were taken during the nighttime while it was in the safe, and that the failure to throw the full combination on the safe allowed the thief access to the package during the nighttime, and that the loss resulted from a breach of the postal regulations. The jury, however, were not given the case on that theory, and it must be admitted that the theory of the Circuit Court of

Appeals that Section 291 of the postal regulations renders the postmaster liable for the loss on his failure to use due care to protect the property, without any connection being shown between the lack of care and the loss except the fact that the loss occurred during the failure to obey the regulations, raises a debatable question.

The amount involved in this case is only $9,000, but the question respecting the basis for liability of postmasters for the loss of registered mail through theft is one of general importance.

The record is in a jumble, and the treatment of the case by the trial court involved so many inconsistencies that the case is difficult to analyze, but we do not feel justified under the circumstances in opposing the petition for certiorari on the ground that the decision below was plainly correct.

Respectfully submitted.

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APRIL, 1926.

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 344

T. H. DEAL AND UNITED STATES FIDELITY & Guaranty Company of Baltimore, Maryland, petitioners

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court filed no opinion. The opinion of the Circuit Court of Appeals (R. 539) is reported in 11 F. (2d) 3.

JURISDICTION

The judgment sought to be reviewed was entered by the Circuit Court of Appeals for the Ninth Circuit on February 15, 1926. (R. 553.) On March 22, 1926, a petition for rehearing was denied. (R. 554.) Petition for certiorari was filed April 17, 1926, and granted May 24, 1926. (R. 559.) The jurisdiction of this Court to issue the writ is

found in Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (Chap. 229, 43 Stat. 936).

THE QUESTION

The only important question presented in the petition for certiorari is whether a postmaster and the surety on his bond are liable for theft of the contents of a registered package while in his post office and not cared for with due care or as required by the regulations of the Post Office Department, although there is no proof that the negligence or failure to obey the regulations was the proximate cause of the loss.

REGULATIONS INVOLVED

Section 291 of the Postal Laws and Regulations (1913), which were in force at the time the matters in controversy occurred, provides (italics ours):

> *When a post office has been robbed,* the postmaster shall immediately report all the facts to the Chief Inspector and to the post-office inspector in charge of the division in which the post office is located. (See sec. 35.) The report should give, if possible, all the circumstances connected with the robbery, the date, a detailed inventory of the loss, the denominations of stamped paper stolen, the amount of postal and money-order funds and of each class of Government property. *The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the*

property. If the loss includes the mail key the number should be given. (See sec. 1527.) Full particulars regarding registered mail lost or rifled should be reported. The Chief Inspector shall promptly notify the Assistant Attorney General of every such casualty from which a claim for credit under the provisions of section 150 may arise.

2. All subsequent developments shall be reported to the same officers.

3. Brief telegraphic report of the robbery of a post office should also be made when practicable to the post-office inspector in charge of the division in which the post office is located (see sec. 35), the telegram to be sent "collect" and indorsed "Official business, collect Government rate."

Section 940 of said Postal Laws and Regulations provides:

> Postmasters and other postal employees will be held personally responsible by the Post Office Department for the wrong delivery, depredation upon, or loss of any registered letter or parcel if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations.

The regulations which were violated by the postmaster will be found on pages 19–21 of this Brief.

STATEMENT

The petitioner Deal was postmaster at Fairbanks, Alaska, at the time in question in the case. (R. 5.) The petitioners executed and delivered to the

United States an official bond conditioned that Deal should "faithfully discharge all duties and trusts imposed on him as postmaster either by law or by the regulations of the Post Office Department * * *." (R. 4, 9.)

On September 15, 1921, the First National Bank of Fairbanks delivered to the register clerk at the Fairbanks post office a package to be registered, containing $9,900 in currency and $37.65 in silver, addressed to Frank Doner, Healy, via Nenana, Alaska. (R. 46–48, 122–124.) The money belonged to the United States and was sent to Doner as disbursing agent for the Alaskan Engineering Commission, a governmental agency. (R. 37, 41, 42.)

The register clerk, Miss Houck, registered the package. She testified that she thought the package contained money, but was not sure. (R. 54.) She placed the package in a basket behind her (R. 55), and another post-office clerk, Miss Smith, took it and placed it in another basket, where it remained for an hour or so (R. 62). Miss Smith placed the package in a jacket or container, around which she tied a string, and put it in a small safe in the post office. (R. 62–64.) She put the safe on the day combination, which meant that the knob of the combination was turned about three points (R. 65, 69), and the next morning when she took the package out of the safe she found the safe still on the day combination (R. 65). Mr. Deal himself

testified that on the night of September 15th the safe was on the day combination. (R. 312.)

About eight o'clock on the evening of September 15th Mr. Hering, who had formerly been, but was no longer, employed at the post office, got the key of the office from Mr. Deal, the postmaster, and entered the office to place some mail in the outgoing sacks and get the mail from his box. (R. 105–109.)

On the morning of September 16th Miss Smith took the package from the safe, and without opening the jacket placed it in the pouch containing mail for Nenana, which Mr. Deal locked. (R. 65, 66.) When the package arrived at Nenana it was found that the canvas sack in which the bank had shipped the money had been slit and then fastened with a nail, and the currency had been extracted and a magazine put in its place. (R. 184–189.)

There was evidence bearing on the question whether the sack had been opened at Fairbanks. (R. 209, 210, 237–239, 241, 242.)

There was much testimony concerning the transportation of the package from which the currency was stolen from the time it left the post office at Fairbanks until it was opened by the agent of the addressee and the robbery discovered. (R. 83–147, 154–205, 259–275.) This indicated that the robbery could not have occurred after the package left the Fairbanks post office and was sufficient to justify the jury in finding that the robbery occurred while

the package was still in that post office, and the jury did so find, because whatever other inconsistencies there were in the charge of the trial court it consistently charged that no recovery could be had unless the loss occurred in the Fairbanks post office.

The trial judge attempted to submit the case to the jury on three different theories. One theory was that the postmaster could be held liable for the loss of money only if guilty of negligence as the result of which the loss occurred. In charge No. 13 (R. 392) the court charged that unless the jury found—

> the loss was occasioned by his carelessness or negligence by reason of his disregard of the law or regulations * * * your verdict must be for the defendants.

And in charge No. 15 (R. 394) it said that the failure of a postmaster, which produces a loss, to observe the postal regulations renders him liable for loss of registered matter. In charge No. 16 (R. 395) and charge No. 25 (R. 402) it dealt again with the case on the basis of negligence.

Another theory on which part of the charge was based was that to hold the postmaster liable it must appear that he violated some regulation respecting the care of the registered package, but that it was not necessary to show that the violation of the regulation was the proximate cause of the loss. Such a theory is reflected in charge No. 19 (R. 397), charge No. 21 (R. 398), charge No. 24 (R. 401), charge No. 26 (R. 403), and charge No. 27 (R. 403).

A third theory was that if the postmaster knew that the registered package contained money and that the money was the property of the United States he was absolutely liable for the loss thereof as an insurer, whether or not he was in any way at fault. This theory was presented to the jury in charge No. 22. (R. 399.)

The Circuit Court of Appeals rejected the theory that a postmaster is absolutely liable as an insurer for loss from a registered package containing money belonging to the United States and held that the twenty-second charge of the trial court applying that theory was erroneous. (R. 544, 549.)

It adopted the theory that proof of violation of some regulation respecting the care of the registered package was sufficient to impose liability on the postmaster, without any evidence to show that the violation of the regulation was the proximate cause of the loss. (R. 545, 546.) It held that since it conclusively appeared and was admitted that the postmaster violated the regulations respecting the care of the registered package the error contained in the twenty-second charge of the trial court was without prejudice. (R. 549, 550.)

We believe that the Circuit Court of Appeals was right in rejecting the theory that a postmaster is absolutely liable as an insurer for loss of a registered package containing money belonging to the United States. Such money is not public money within the meaning of Section 3846 of the Revised

Statutes. See *Smyer* v. *United States,* No. 131, October Term, 1926, decided February 21, 1927.

We further believe that on the evidence in the case the jury would have been justified in finding that the loss was due to the postmaster's negligence and failure to comply with regulations relating to the care of the registered package. The jury, however, was not given the case on that theory alone. This seems to narrow the case down to the single question of law, whether under Section 291 of the Postal Regulations, a postmaster may be held liable for theft of the contents of a registered package while it is in his custody and not guarded as required by the regulations, without any proof that the negligence or failure to obey the regulations caused the loss or brought about the theft.

This question, not presented in any large number of pending cases and involving construction of a doubtful regulation which may be amended to remove ambiguity, we should not have presented to this Court if the decision below had been unfavorable to the United States.

SUMMARY OF ARGUMENT

I. It is not and can not be questioned that the postmaster's bond covered a loss of registered mail.

II. The regulations bearing on the liability of a postmaster for loss of registered mail while in his custody and not properly cared for are not clear, but are fairly susceptible of the construction that the postmaster is liable, although there is no evi-

dence that the lack of care caused the loss. Section 291 of the 1913 edition of the Postal Laws and Regulations, dealing with robbery of post offices, makes the postmaster responsible if he fails to exercise due care in the protection of the property, and there is no intimation in its language that responsibility results only if the loss is the proximate result of the failure to exercise due care. That losses of registered mail in the robbery of a post office are covered by this provision of Section 291 and not by Section 940 is indicated by the fact that registered mail is specifically referred to in other portions of Section 291, by the location of the sections in the Postal Laws and Regulations, and by sections similar to Section 291 in earlier editions, which specifically referred to registered mail, since it can not be presumed that the general language used in Section 291 was intended to change the rule as to registered mail.

III. There is no question that the postmaster, Deal, violated various regulations with respect to the care of registered mail and did not use due care in the protection of the package from which the currency was stolen, and therefore the judgment below should be affirmed if under the regulations responsibility in such a case does not depend upon a showing of proximate cause.

IV. The other points discussed in the petitioners' brief do not disclose any ground for reversing the judgment below.

V. If the matter is entitled to consideration by this Court, the petitioners are probably entitled to modification of the judgment of the Circuit Court of Appeals as to the costs to be taxed against them. Under Section 1462 of the Compiled Laws of Alaska the taxable costs included mileage of witnesses from any point within the district, or from the district line to the place of trial and return, but mileage of witnesses outside of the district should not have been included.

ARGUMENT

I

THE POSTMASTER'S BOND COVERED A LOSS OF REGISTERED MAIL

It is not questioned that the postmaster's bond was intended to cover loss of registered mail, whether or not owned by the United States. The bond ran to the United States as obligee. Its condition was (R. 9)—

> That if the said Thomas H. Deal shall faithfully discharge all duties and trusts imposed on him as postmaster either by law or by the regulations of the Post Office Department, * * * then this obligation shall be void * * *.

Even though neither the bond nor any statute or regulation provide expressly that the bond shall inure to the benefit of any person sending registered mail, the law seems to be settled that the United States may maintain an action on such a bond to recover for the loss of registered mail matter belonging to private citizens, and in such an

action may recover the full value of the property lost, and not merely the amount for which the United States may be liable, the United States being under a moral if not a legal obligation to turn over the proceeds of the suit to the person suffering the loss.

National Surety Co. v. *United States,* 129 Fed. 70.

United States v. *American Surety Co.,* 155 Fed. 941.

Gibson v. *United States,* 208 Fed. 534.

United States Fidelity & Guaranty Co. v. *United States,* 229 Fed. 397.

United States v. *United States Fidelity & Guaranty Co.,* 247 Fed. 16.

If a suit may be maintained by the United States on such a bond to recover the value of loss of registered mail belonging to a citizen, there seems to be no reason why the United States may not maintain a suit on the bond for its own benefit where it happens to be the owner of the contents of a registered-mail package.

II

THE REGULATIONS BEARING ON THE LIABILITY OF A POSTMASTER FOR LOSS OF REGISTERED MAIL WHILE IN HIS CUSTODY AND NOT PROPERLY CARED FOR ARE NOT CLEAR, BUT ARE FAIRLY SUSCEPTIBLE OF THE CONSTRUCTION THAT THE POSTMASTER IS LIABLE, ALTHOUGH THERE IS NO EVIDENCE THAT THE LACK OF CARE CAUSED THE LOSS

Section 291 of the 1913 Edition of the Postal Laws and Regulations, dealing with robbery of post offices, contains the clause:

> The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the property.

There is no intimation in this language that responsibility results only if the loss is the proximate result of the failure to exercise due care. Taking the words used at their face value, they mean that a failure to properly protect the property, followed by a robbery during the time such failure exists, is sufficient to impose responsibility, although there is no direct proof that the failure to use due care produced the loss. As pointed out by the Circuit Court of Appeals, it is often difficult to determine whether negligence of the postmaster has contributed to a loss of property stolen from a post office. The exact circumstances of robberies are rarely known, and the postal authorities may well have thought that a postmaster who does not use due care to protect property in his possession should be responsible for any loss by robbery which may occur, without casting upon the owner of the property, who is entirely innocent, the often impossible burden of showing the circumstances surrounding the loss.

And while a bailee is ordinarily liable only for negligence, there is nothing to prevent him from enlarging his legal responsibility by contract, express or implied. (*Sturm* v. *Boker,* 150 U. S. 312, 330; *Sun Printing & Publishing Assn.* v. *Moore,* 183 U. S. 642, 654.)

A more serious question is whether the word "property" in the clause of Section 291 quoted above includes registered mail or refers only to Government property. The clause is immediately preceded by a provision that when a post office has been robbed the postmaster shall report, if possible—

> all the circumstances connected with the robbery, the date, a detailed inventory of the loss, the denominations of stamped paper stolen, the amount of postal and money-order funds and of each class of Government property.

The clause is immediately followed by the following:

> If the loss includes the mail key the number should be given. (See sec. 1527.) Full particulars regarding registered mail lost or rifled should be reported.

The location of the clause relating to responsibility, between the provisions as to what shall be reported, is illogical, but there is nothing in the structure of the paragraph which can properly be regarded as restricting the word "property" as used in the clause to Government property. The paragraph as a whole relates to registered mail as well as to Government property, and even if it be admitted that the language preceding the clause is to be given more weight than that following it in determining the meaning of the word "property," the provision preceding requires "a detailed inven-

tory of the loss," which undoubtedly includes registered mail as well as Government property.

The petitioner contends that the liability of a postmaster for loss of registered mail, resulting from robbery of a post office, as well as otherwise, is governed by Section 940 of the Regulations, making the postmaster responsible "for the wrong delivery, depredation upon, or loss of any registered letter or parcel if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations." The Circuit Court of Appeals said (R. 547):

> There is no conflict between Sections 291 and 940. The latter defines the general responsibility of postmasters and the former their responsibility when post offices are robbed.

Section 291 is a part of Subdivision V of Chapter 3 of Title Three of the Postal Laws and Regulations. The subject of Title Three is "Post Offices." Chapter 3 thereof is entitled "General Provisions Relating to Post Offices." Subdivision V is entitled "Miscellaneous Provisions."

Section 940 is a part of Subdivision V of Chapter 1 of Title Six of the Postal Laws and Regulations. The subject of Title Six is "Registry System." Chapter 1 thereof is entitled "Registration of Domestic Mail Matter." Subdivision V is entitled "Treatment of Registered Matter at Offices of Delivery."

The petitioner, taking issue with the Circuit Court of Appeals, contends that Title Three con-

tains general provisions and Title Six particular provisions. It is apparent that the distinction is meaningless. Title Three contains general and particular provisions relating to post offices and Title Six contains general and particular provisions relating to the registry system. Section 940, relating to "the wrong delivery, depredation upon, or loss of any registered letter or parcel," does not specifically include a loss in the case of a robbery of a post office. Section 291, relating to "when a post office has been robbed," does specifically refer to losses of registered mail in such robberies. It would, therefore, seem that the responsibility of a postmaster for loss of registered mail in the robbery of a post office should be governed by Section 291 and not by Section 940.

Moreover, Chapter 8 of Title Three is entitled "Care of Public Funds and Property—Deposits of Surplus Funds," and Chapter 11 of Title One is entitled "Losses of Funds and Stamped Paper." If the provision in Section 291 relating to a postmaster's responsibility for losses applied only to losses of Government property, it might more properly have been included in one of these chapters dealing with Government property than in Chapter 3 of Title Three, which contains "General Provisions Relating to Post Offices."

Specific provision as to the liability of the postmaster in case of robbery of a post office appears for the first time in the 1879 edition of the Postal

Laws and Regulations. Section 492 provided (italics ours):

> Postmasters to immediately Report Robbery of Post Office.—Whenever a post office has been robbed the postmaster will immediately report all the facts to the Chief Special Agent, and to the nearest resident Special Agent. This report must state as fully as possible all the circumstances connected with the robbery, giving the date and extent of the loss. He must be careful to state whether the loss consists of stamps, stamped envelopes, postal cards, letters (stolen or rifled), postal or money-order funds, or Government property. If the loss includes the mail key the number should be given; and if registered or ordinary mail matter, he must be particular to state whether the same was rifled or taken from the post office. He must give all the information in his possession relating to each lost or rifled registered letter, such as post office where mailed, date of mailing, number of letter and registered-package envelope, by whom written, to whom addressed, and contents. *For the value of registered or ordinary mail lost by robbery of post offices postmasters will be held responsible if, upon investigation, it appears that due care was not taken to secure the mail matter from depredation.*

And this section was contained in Title II, entitled "Post Offices and Postmasters," not in Title V, entitled "The Registry System."

Section 700 of the edition of 1887 contained the following:

> For the value of registered or ordinary mail matter lost by robbery of post offices, the postmaster may be held responsible to the losers, if upon investigation it appears that due care was not taken for the protection of the property.

Section 669 of the edition of 1893 was the same as section 700 of the edition of 1887.

Section 278 of the edition of 1902 contained the following:

> For the value of registered or ordinary mail matter lost by robbery of post offices, the postmaster will be held responsible, if upon investigation it appears that due care was not taken for the protection of the property.

Each of these sections related to the report to be made "when a post office has been robbed" and was contained in the Title relating to "Post Offices and Postmasters," not in the Title relating to "The Registry System." It seems inconceivable that the post-office authorities intended, by the general language used in Section 291 of the edition of 1913, to eliminate from the provision as to responsibility, responsibility for registered mail, which had been covered by similar sections since 1879. It is much more probable that in using the more general language in the 1913 edition—

> The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the property—

the post-office authorities intended to broaden the effect of the section to include Government prop-

erty as well as "registered or ordinary mail lost by robbery of post offices."

It is also worthy of note that Section 864 of the 1902 edition of the Postal Laws and Regulations was substantially similar to section 940 of the 1913 edition, and apparently was not regarded as inconsistent with Section 278, *supra,* although the latter section expressly referred to "registered or ordinary mail matter lost by robbery of post offices."

Petitioners lay considerable stress on the Act of May 9, 1888, c. 231, 25 Stat. 135, as amended by the Act of June 11, 1896, c. 424, 29 Stat. 458, which is embodied in the 1913 Postal Laws and Regulations as Section 150, and which authorizes the Postmaster General—

> to investigate all claims of postmasters for the loss of money-order funds, postal funds, postage stamps, stamped envelopes, newspaper wrappers, and postal cards, belonging to the United States in the hands of such postmasters, resulting from burglary, fire, or other unavoidable casualty, and if he shall determine that such loss resulted from no fault or negligence on the part of such postmasters to pay to such postmasters, or credit them with the amount so ascertained to have been lost or destroyed * * *.

The argument is that since provision is made in the case of loss of Government property for relieving a postmaster from the consequences of the responsibility imposed by Section 291, where the loss resulted from no fault or negligence on the

part of the postmaster, and no similar relief can be granted in the case of loss of registered mail, Section 291 must be construed as not applying to losses of registered mail.

But it should be noted that no construction of Section 291 can put responsibility for loss of registered mail on the same basis as responsibility for the loss of Government property. In the case of Government property a postmaster is "responsible for the loss if he fails to exercise due care in the protection of the property," but may be relieved, under the provisions of the statute, if it affirmatively appears "that such loss resulted from no fault or negligence" on the part of the postmaster. In the case of registered mail, either a postmaster "is responsible for the loss if he fails to exercise his due care in the protection of the property" and can not be relieved except by Act of Congress, or a postmaster is under absolutely no responsibility, although he used no care in the protection of the property, unless the United States can affirmatively prove that the failure to exercise due care was the proximate cause of the loss. We believe the former rule was the one intended by the postal authorities.

III

THERE IS NO QUESTION THAT THE POSTMASTER, DEAL, VIOLATED VARIOUS REGULATIONS WITH RESPECT TO THE CARE OF REGISTERED MAIL AND DID NOT USE DUE CARE IN THE PROTECTION OF THE PACKAGE FROM WHICH THE CURRENCY WAS STOLEN

The petitioners concede that the postmaster, Deal, violated various regulations with respect to the

care of the package from which the currency was stolen (Brief 16), and therefore the judgment below should be affirmed if, under the regulations, responsibility in such a case does not depend upon a showing of proximate cause. Under the circumstances no extended discussion of the regulations violated is necessary, but it may be of assistance to the Court if we refer to them briefly.

The Circuit Court of Appeals referred to Section 361 of the 1913 Regulations, which requires safes to be carefully and completely locked at night and not fastened only with a day combination, and further requires a postmaster to change the combination immediately whenever a safe is procured. That section is in chapter 8 of Title Three, which is entitled "Care of Public Funds and Property—Deposits of Surplus Funds." Consequently we do not believe it is applicable to registered mail.

But paragraph 20 of the 1920 Postal Guide (R. 294) provides:

> Registered articles known or presumed to contain large values, such as coin, currency, securities, etc., to be made the object of special care, in so far as practicable, both at post offices and while in transit. Such articles, as far as practicable, should be given proper vault or safe protection, handled under the supervision of responsible supervisory officials or employees, and such receipts should be taken, and care exercised in billing and checking as will make it possible to place responsibility in cases of loss or depredation.

That regulation says nothing about combinations of safes, but it does require registered articles presumed to contain large values to be given proper vault or safe protection, and placing a valuable money package in an iron safe on a day combination overnight, so that anyone of a number of postal employees could open the safe or anyone ignorant of the combination could open it by merely turning the dial a few points to the right, was not proper safe protection, so that the Circuit Court of Appeals was right in saying that a violation of the regulations had occurred with respect to the care of this registered package.

There was also a violation of Section 524 of the Regulations (R. 543) in allowing one not an employee of the Department to have access to mail matter. A man formerly employed in the post office was allowed to enter it the evening of September 15th to get some mail and to dispatch some in the outgoing sacks.

We believe there was also a violation of Section 885, which provides:

> All registered matter shall be kept separate from ordinary matter, and properly protected from accident or theft.

IV

THE OTHER POINTS DISCUSSED IN THE PETITIONERS' BRIEF DO NOT DISCLOSE ANY GROUND FOR REVERSING THE JUDGMENT BELOW

Point II of the Petitioners' Brief is devoted to a discussion of the allegations and evidence which

would have been necessary to sustain a recovery on the theory that the postmaster was absolutely responsible as an insurer for registered mail containing money belonging to the United States. The Circuit Court of Appeals rejected that theory and we do not rely on it. The discussion has no bearing upon the question now before the Court.

Point III and part of Point IV of the Petitioners' Brief point out certain supposed infirmities in the pleadings and proof on the theory that liability is dependent upon causal connection between the postmaster's negligence and the loss. This theory, again, is not the one adopted by the Circuit Court of Appeals nor the one upon which we rely.

The only remaining contention made in the Petitioners' Brief is that the evidence was insufficient to support the verdict as the facts and circumstances that were consistent with the theory that the loss occurred in the Fairbanks post office were equally consistent with the theory that it occurred while the package was being transported to Nenana.

As hereinbefore shown, the evidence was ample to justify the jury in finding that the robbery occurred while the package was in the Fairbanks post office, and the jury did so find. This finding has been sustained by the District Court and the Circuit Court of Appeals, and we believe it can not be questioned now.

V

IF THE MATTER IS ENTITLED TO CONSIDERATION BY THIS COURT, THE PETITONERS ARE PROBABLY ENTITLED TO MODIFICATION OF THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS AS TO THE COSTS TO BE TAXED AGAINST THEM

Although the petition for writ of certiorari contained no complaint of the judgment of the Circuit Court of Appeals with respect to the costs to be taxed, the petitioners now urge that the judgment contains certain errors in this respect.

The first complaint is as to the allowance of any costs for the attendance of the witness James Hagan because he was a deputy United States Marshal, who was paid nothing for his attendance and who traveled on a pass on the Government railroad. The Circuit Court of Appeals held that his necessary expenses in going to, returning from, and attendance on the court were taxable as costs, and this is clearly right. (*United States* v. *Sanborn*, 135 U. S. 271.)

The costs taxed included mileage for certain other witnesses subpœnaed from various points, both within and without the District of Alaska. (R. 428, 429.) Section 1462 of the Compiled Laws of Alaska reads:

> A witness is not obliged to attend for oral examination or otherwise at a place distant more than one hundred miles from the place

> where he resides or at which he may be served with a subpœna; except that in an action or proceeding pending in a court of record the court or judge thereof, upon the affidavit of the party, or some one on his behalf, showing that the testimony of the witness is material and his oral examination important and desirable, may indorse upon the subpœna an order for the attendance of the witness; the service of such subpœna and order and the payment of legal fees to the witness are sufficient to require his attendance, if he be served within the district.

It was stipulated that as to each of the witnesses in question no affidavit was filed or order indorsed on the subpœna as required by the above statute. (R. 443, 444.) The petitioners contend that for this reason the costs taxed should have included mileage for only 200 miles for each of these witnesses.

The Circuit Court of Appeals, apparently through oversight, treated the question as if all of the witnesses were subpœnaed within the district. (R. 551.) It held that mileage is recoverable only for such distance as is necessarily traveled from a place to which a subpœna will run; that a subpœna will run to any point in the territory; that the effect of Section 1462 *supra* is to relieve the witness from the burden of attending unless the subpœna is indorsed as provided therein; that the adverse party is not entitled to complain of the failure to indorse on the subpœna an order requiring the

attendance of the witness; and that if he attends his mileage and per diem may be taxed. (R. 551, 552.)

As to the witnesses subpœnaed within the District, we think the Circuit Court of Appeals was clearly right. The purpose of Section 1462 can be only for the protection of witnesses. The adverse party is not interested in the particular procedure adopted to compel the attendance of witnesses, but only in being protected from unreasonable and unnecessary costs. This protection is furnished him without the statute. A court should always disallow unnecessary and unreasonable items of costs. (*Pine River Logging Co.* v. *United States*, 186 U. S. 279, 297; *United States* v. *Minneapolis, St. P. & S. S. M. Ry. Co.* (D. C. Minn.), 235 Fed. 951; *Kane* v. *Luckman* (C. C. Iowa), 131 Fed. 609, 621; 15 C. J. 146.) The petitioners do not show that the attendance of the witnesses in question was unreasonable or unnecessary (R. 438), and the District Court, which was in the best position to judge, must have determined that it was not. Petitioners have relied on the technical position that they are protected by the statute from the taxation of mileage for over 200 miles, and this position is not sound. (*Spencer* v. *Peterson* (Oregon), 41 Ore. 257, 263.)

As to the witnesses subpœnaed at points without the district the situation is different. The weight of authority in the Federal courts, as stated by the Circuit Court of Appeals, is that mileage is taxable only for such distance as is necessarily traveled by

for the protection of witnesses, and an adverse party can not take advantage of failure to obtain such permission. It follows that if the court in this case is to be regarded as a District Court of the United States and not as a territorial court the judgment of the Circuit Court of Appeals as to costs was right and should be affirmed.

CONCLUSION

The judgment of the Circuit Court of Appeals should be modified as to costs and in other respects affirmed.

WILLIAM D. MITCHELL,
Solicitor General.
GARDNER P. LLOYD,
Special Assistant to the Attorney General.

APRIL, 1927.

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SUPREME COURT OF THE UNITED STATES.

No. 344.—October Term, 1926.

T. H. Deal and United States Fidelity & Guaranty Company of Baltimore, Petitioners, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 16, 1927.]

Mr. Justice McReynolds delivered the opinion of the Court.

Upon his appointment as postmaster at Fairbanks, Alaska, petitioner Deal executed the ordinary official bond, with the Fidelity & Guaranty Company as surety, conditioned that he "shall faithfully discharge all duties and trusts imposed on him as postmaster either by law or by the regulations of the Post Office Department," etc. The United States sued on this bond in a District Court of Alaska and asked judgment for ninety-nine hundred dollars, the amount of currency abstracted from a package deposited in the Fairbanks office for registration and transmission. Judgment upon a verdict went for them and was affirmed by the Circuit Court of Appeals, Ninth Circuit, notwithstanding errors by the trial court, recognized but held to be harmless. 11 Fed. (2d) 3.

Replying to the petition for certiorari from this Court, the Solicitor General very properly said, "The record is in a jumble, and the treatment of the case by the trial court involved so many inconsistencies that the case is difficult to analyse."

The trial judge charged the jury upon three inconsistent theories. (1) That the postmaster was liable for the abstracted money only if guilty of some negligence which caused the loss. (2) That liability existed if he had violated some regulation of the Post Office Department respecting care of the registered package although not shown to be proximate cause of the loss. (3) That the money taken, being property of the United States, was public funds and the postmaster became liable therefor as an insurer as though it had been received from sale of stamps or money orders.

Among other things, the record discloses—

That on September 15, 1921, the First National Bank deposited at the Fairbanks Post Office for registration and transmission a package addressed to the disbursing agent at Healy, Alaska, via Nenana, which contained ninety-nine hundred dollars in currency and some silver belonging to the United States. The clerk who received and registered it thought the package contained money, but was not so advised. Another clerk placed it in an iron safe and left the door on the day combination.

That during the night of September 15 petitioner Deal permitted an unauthorized person to enter the office. September 16 the package was placed in the pouch destined to Nenana. Upon its arrival at that place the currency was gone—a magazine filled the space.

That some evidence touching treatment of the package at the Fairbanks office and much testimony concerning transportation, tended to show the bills were abstracted while it remained there.

Considering the serious nature of the errors committed by the trial court and upon the entire record, we must conclude that they caused material prejudice to the petitioners' substantial rights. Act February 26, 1919, c. 48, 40 Stat. 1181. Accordingly, the challenged judgment must be reversed and the cause remanded for another trial. Under this conclusion, we need only consider matters probably important for further conduct of the cause.

The Circuit Court of Appeals properly rejected, and the Solicitor General does not rely upon, the theory that under § 3846 R. S. (§ 360 Postal Regulations 1913) the postmaster became liable for the registered package as an insurer. That section provides: "Postmasters shall keep safely, without loaning, using, depositing in an unauthorized bank, or exchanging for other funds, all the public money collected by them, or which may come into their possession, until it is ordered by the Postmaster General to be transferred or paid out." Public money, within this provision, "obviously is money belonging to the United States in such sense that it may be ordered by the Postmaster General to be transferred or paid out." *Smyer* v. *United States*, — U. S. —, [Feb. 21, 1927].

It is admitted that petitioner Deal failed to observe certain regulations intended to secure safety of registered matter; but it is stoutly denied that the evidence showed any causal connection between such negligence or disregard of duty and the loss sustained.

During 1921 the 1913 Edition, Postal Laws and Regulations, was in force. Sections which require special consideration follow.

Sec. 291. When a post office has been robbed, the postmaster shall immediately report all the facts to the Chief Inspector and to the post-office inspector in charge of the division in which the post office is located. (See sec. 35.) The report should give, if possible, all the circumstances connected with the robbery, the date, a detailed inventory of the loss, the denominations of stamped paper stolen, the amount of postal and money-order funds and of each class of Government property. The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the property. If the loss includes the mail key the number should be given. (See sec. 1527.) Full particulars regarding registered mail lost or rifled should be reported. The Chief Inspector shall promptly notify the Assistant Attorney General of every such casualty from which a claim for credit under the provisions of section 150 may arise. . . .

Sec. 940. Postmasters and other postal employees will be held personally responsible by the Post Office Department for the wrong delivery, depredation upon, or loss of any registered letter or parcel if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations. [The provisions of this section appear unchanged as § 989, Edition 1924 of the Regulations.]

Sec. 150 [Act May 9, 1888, c. 231, 25 Stat. 135, as amended by Act June 11, 1896, c. 424, 29 Stat. 458]. That the Postmaster General be, and he is hereby, authorized to investigate all claims of postmasters for the loss of money-order funds, postal funds, postage stamps, stamped envelopes, newspaper wrappers, and postal cards, belonging to the United States in the hands of such postmasters, resulting from burglary, fire, or other unavoidable casualty, and if he shall determine that such loss resulted from no fault or negligence on the part of such postmasters, to pay to such postmasters, or credit them with the amount so ascertained to have been lost or destroyed, etc., etc.

Did § 291 impose liability for theft from the registered package while held by the postmaster and not protected as the Regulations required, without evidence to show that the loss resulted from

failure to observe them? If so, it was unnecessary to show such causal connection, as the United States maintain. But if § 940 defined the responsibility, as he insists, that relation was essential.

Section 492, Edition 1879, Postal Laws and Regulations; § 700, ed. 1887; §669, ed. 1893; § 278, ed. 1902; § 328, ed. 1924, correspond to § 291, ed. 1913.

Edition 1879. "Sec. 492. *Postmasters to immediately report robbery of post office.* Whenever a post office has been robbed the postmaster will immediately report all the facts . . . This report must state as fully as possible all the circumstances connected with the robbery, giving the date and extent of the loss. He must be careful to state whether the loss consists of stamps, stamped envelopes, postal cards, letters (stolen or rifled), postal or money-order funds, or government property. . . . He must give all the information in his possession relating to each lost or rifled registered letter . . . For the value of registered or ordinary mail lost by robbery of post offices postmasters will be held responsible if, upon investigation, it appears that due care was not taken to secure the mail matter from depredation."

Edition 1887. "Sec. 700. *Reports of robberies of post offices.* . . . As to registered matter lost or rifled, the report should specify the post office where mailed, date of mailing, number of letter and registered package envelope, by whom written, to whom addressed, and contents, if known. For the value of registered or ordinary mail matter lost by robbery of post offices, the postmaster may be held responsible to the losers, if upon investigation it appears that due care was not taken for the protection of the property. . . ."

Section 669, Edition 1893, does not differ materially from § 700, Edition 1887; and this is true of § 278, Edition 1902, except the latter declares "the postmaster *will be held* responsible," while the two previous editions say "*may be held.*"

Edition 1924. "Sec. 328. When a post office has been broken into by burglars, the postmaster shall [make report, etc.] . . . Full particulars also regarding registered mail lost or rifled should be given. . . . The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the property."

Section 864, Edition 1902, (to which § 940, Edition 1913, corresponds) provides—"Postmasters will be held personally responsible

by the Post Office Department for the wrong delivery, depredation upon, or loss of any registered letter or parcel while in their custody, if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations. They are also liable on their bond for any damage resulting to the Department on account of such wrong delivery, depredation, or loss."

For many years the Regulations imposed possible or positive liability upon postmasters for loss of registered mail when the office had been robbed and lack of care appeared; also the general provisions of § 940. And the argument is that we cannot deduce from the altered language of § 291, Edition 1913, intention to relieve from the strict liability theretofore imposed. But why the change if it meant nothing? And may petitioners be subjected to liability because of language found in ancient Regulations of which, probably, they had no knowledge?

On the other hand is the suggestion that to hold postmasters responsible under § 291 for the loss of currency from registered packages would produce an anomalous situation, since this would leave the Postmaster General with full power, under § 150, to relieve where money order funds are lost but with no such power where money belonging to the United States is taken from a registered package the contents of which had not been revealed.

Difficulties, of course, arise from the words "robbery" in § 291 and "depredation upon" in § 940. Robbery, accurately defined, is "the felonious and forcible taking from the person of another, goods or money to any value, by violence or putting him in fear." *Bouvier's Law Dictionary; Jolly* v. *United States*, 170 U. S. 402, 404. Depredation is "the act of plundering; a robbing; a pillaging." *Century Dictionary*. Apparently the Regulations contained no definition of these terms. Generally, at least, the word "robbery" conveys the idea of violence and it is hardly appropriate to stealthy abstraction. One may well doubt the application of § 291 in the circumstances here disclosed. The author of § 328, of the Regulations, Edition 1924, probably noted that larceny, burglary and robbery are distinct offenses.

The structure and language of § 291 are not wholly inconsistent with the theory that postmasters "shall be held responsible for the loss" of property described by the lines immediately preceding the quoted words; but for "registered mail lost or rifled" "when a post office has been robbed" they become responsible only if the

"depredation or loss be due to negligence or disregard of the Regulations."

Certainly the Regulations of 1913 are far from clear. Considering the language and the arrangement of § 291 along with the general provisions of § 940, and not forgetting that both were prepared by the Post Office Department, are subject to alteration, impose large responsibility, and should be construed according to the probable understanding of men who accept such offices, we conclude that § 940 prescribed the petitioners' responsibility, and the jury should have been charged accordingly. It was necessary to show causal connection between the loss and the alleged negligence or disregard of regulations.

We accept the ruling by the Circuit Court of Appeals as to the disputed items of cost taxed against petitioners by the trial court, except as to charges by witnesses for travel outside the district. That item should be eliminated.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.